Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

MARY BUETTNER,
Petitioner,

v.

ARCH COAL SALES CO., INC., ET AL,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

After *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000), the District Court and the Eighth Circuit, without mention of *Reeves*, respectively, granted and affirmed summary judgment for Respondent on Petitioner's Title VII retaliation claim.

Are the lower court opinions consistent with *Reeves*?

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OPINIONS BELOW

The District Court granted summary judgment and entered Final Judgment for Arch Coal on July 21, 1999. The District Court Opinion is published at *Buettner v Arch Coal Sales Co, Inc., et al*, 1999 U.S. Dist. LEXIS 21925 (E.D. Mo. July 21, 1999) and reproduced in Appendix A. The published opinion of the United States Court of Appeals for the Eighth Circuit affirming the District Court's judgment appears at *Buettner v Arch Coal Sales Co, Inc., et al*, 216 F.3d 707 (8th Cir. 2000) and reproduced in Appendix B. The Eighth Circuit's denial of Ms. Buettner's Petition for Rehearing En Banc appears at *Buettner v Arch Coal Sales Co, Inc., et al*, 2000 U.S. App. LEXIS 19983 (8th Cir. August 11, 2000) and reproduced in Appendix C.

JURISDICTION

On July 21, 1999, the District Court entered Final Judgment for Arch Coal, from which Mary Buettner timely appealed. *See* Appendix C. On June 26, 2000, the United States Court of Appeals for the Eighth Circuit affirmed the District Court's Final Judgment. *Buettener v. Arch Coal Sales Co., Inc. and Arch Coal, Inc.*, 216 F.3d 707 (8th Cir. 2000); Appendix B. On August 11, 2000, the Eighth Circuit denied Mary Buettner's Petition for Rehearing *En Banc*. See Appendix A. This Petition for Writ of Certiorari is filed within ninety days of the Eighth Circuit's denial of the Petition for Rehearing *En Banc*. Therefore, the Court has jurisdiction pursuant to 28 U.S.C. §§1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Seventh Amendment, United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 2000e-3 (1994)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training, or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. §1981a(c)(1) (The Civil Rights Act of 1991)

Section 102"(c)Jury Trial. - If a complaining party seeks compensatory or punitive damages under this section -

"(1) any party may demand a trial by jury.

STATEMENT OF THE CASE

Mary Buettner filed suit against Arch Coal alleging that, in violation of Title VII and the parallel state anti-discrimination law, the company terminated her in retaliation for opposing gender discrimination against women. Ms. Buettner requested a jury trial.

Although the parties vigorously contested numerous material facts, the District Court granted summary judgment on all claims,[1] including plaintiff's retaliation claim. The Eighth Circuit affirmed. The question before this Court is whether, in light of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct.2097, 68 U.S.L.W. 4480 (June 12, 2000), a jury, not a judge, should have resolved the substantive factual disputes.

Several facts are undisputed. From 1993-1995, Ms. Buettner worked for Arch Coal as corporate counsel assigned to its Coal Sales Division. In 1994, as reflected in Arch Coal's own promotion documents, General Counsel Jeffry Quinn decided that Ms. Buettner was his number one choice for a Senior Commercial Attorney position. The company's succession document also shows Mary Buettner as qualified to succeed Quinn in the General Counsel position. (8th Cir. App. 485, 488, 493)[2] Then, in a 1995 reduction in force, Quinn selected

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[1] Ms. Buettner's suit also included a wage discrimination claim under Title VII and the parallel state law, but the grant of summary judgment on the wage claim is not included in this Petition.

[2] References to the summary judgment record before the Eighth Circuit (Appendix) will be designated herein as "8th Cir. App.", followed by the page number. References to the Appendix to this Petition will be referred to merely as "App," followed by the page number.

Buettner for lay-off over a less senior, less experienced attorney whom Quinn had, in 1994, rated as his fourth choice for Assistant Commercial Attorney.(8th Cir. App. 491) Quinn made his decision to select Buettner for layoff after she had begun in Decermber 1994 to repeatedly complain to him about the sex-discriminatory behavior of her boss, Patrick Panzarino.

Beginning in December, 1994, Ms. Buettner began to notify Quinn of Panzarino's hostility toward her. Despite Panzarino's acknowledgment in his own words that Ms. Buettner was "one of the best attorneys I ever worked with in my career," he refused to conduct her annual performance review, a precondition to receipt of the annual salary raise. (8th Cir. App. 449-50) In March, 1995, Ms. Buettner e-mailed Quinn to express her concern that Panzarino's refusal to evaluate her was holding up her raise and her additional concern about falling "so far behind the male attorneys in salary that the only way to catch up is to leave."[3] (8th Cir. App. 432) Throughout March-June, 1995, Panzarino refused to evaluate Ms. Buettner, who repeatedly complained to Quinn and asked him for his assistance. (8th Cir. App. 449)

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[3] Upon hiring Ms. Buettner, Quinn told her that she was being paid less than a similarly situated male attorney but that he intended, eventually, to equalize their wages.(8th Circuit Addendum to Appellant's Opening Brief, p. 3) In 1990, before Ms. Buettner was hired by Arch Coal, the Department of Labor, Office of Federal Contract Compliance cited the company for numerous violations of Executive Order 11246 regarding, among other things, its failure to recruit, train and place females into various job opportunities and its failure to afford women equal pay raises as afforded men. As a result, Arch Coal was made to pay certain women back wages, and to maintain "appropriate personnel records" necessary for monitoring compliance. (8th Cir. App. 461)

Tension between Ms. Buettner and Mr. Panzarino came to a head in mid-June, 1995, when, in a fit of anger, Panzarino ordered her to "clear out all your things and be out of the building by the end of the day." (8th Cir. App. 441). Buettner immediately informed Quinn of the incident and told him of a remark that Panzarino had recently made to a female colleague to the effect that "women and minorities don't belong in the coal business." (8th Cir.App. 426-27, 441, 445, 460). Ms. Buettner told Quinn she considered Panzarino's remark to be sex discriminatory. (8th Cir. App. 445) Quinn's response to Ms. Buettner was that he was unsure if she still had a job (8th Cir. App. 443) but that he would investigate Panzarino's remark concerning women and minorities. (8th Cir. App.445, 460)

Later, Quinn informed Ms. Buettner that he had investigated and found that Panzarino had not said that women and minorities don't belong in the coal business, but that "women and minorities can't succeed in the coal business," a clarification Ms. Buettner did not find reassuring. (8th Cir. App. 445). In an effort to get some resolution to the ongoing problems with Panzarino, Ms. Buettner requested a meeting with managers in Human Resources. At the June 22, 1995 meeting, she expressed her concern not only that Panzarino's actions were adversely affecting her work conditions, but also that in general, Panzarino had a "problem with women." (8th Cir. App. 440, 444)

Weeks later, on August 29, 1995, Quinn selected Ms. Buettner for layoff over a less senior, less experienced attorney, Anne O'Donnell. He claimed that his decision to select Ms. Buettner over Ms. O'Donnell was based upon the independent recommendation of a consultant hired to assist in decisions regarding layoffs. (8th Cir.

App. 547) But Arch Coal's and the consultant's documents reflect that Quinn made his decision *before* he received the consultant's recommendation. (8th Cir. App. 579, 900, 903). And the consultant's initial recommendation was to retain one senior commercial attorney, not a junior, less experienced attorney.(8th Cir. App. 575-77;799)[4] The company then terminated Ms. Buettner in September of 1995.

After exhausting her administrative remedies, she sued Arch Coal under Title VII and the parallel state law, alleging that the company had terminated her in retaliation for internally opposing gender discrimination. Arch Coal disagreed that Ms. Buettner's complaints to Quinn and Human Resources should be characterized as "opposing gender discrimination" and denied subjecting Ms. Buettner to any unlawful retaliation, claiming instead that she was selected for layoff for economic reasons and that her selection was based upon the independent recommendation of the consultant.

Despite the parties' conflicting evidence and the competing inferences therefrom, the district court granted Arch Coal's Motion for Summary Judgment. While the district court assumed that Ms. Buettner's June, 1995 complaints constituted "protected action," the court found that the "temporal proximity" of Buettner's complaints in mid-June to her September termination was insufficient to establish a causal connection between the complaint and the termination. (App., C44) In

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[4] As recently as a year earlier, prior to Buettner's complaints about Panzarino, Quinn had designated Buettner as his first choice for a senior commercial attorney job and Ms. O'Donnell, whom he retained over Ms. Buettner, as his fourth choice for an Asst. Commercial Attorney position. (8th Cir. App. 488, 491)

addition, the court found that Ms. Buettner had not presented evidence from which a reasonable jury could conclude that Arch Coal's "reasons for its employment decision were a pretext for improper motive." (App. C44)

The Eighth Circuit[5], for reasons similar to those articulated by the district court, affirmed the grant of summary judgment, holding that Ms. Buettner "appears not to proffer sufficient evidence of a causal link between her complaints of discrimination and her dismissal." (App. B13, 24) The Eighth Circuit also denied Ms. Buettner's Petition for Rehearing En Banc. (App. A1)

REASONS FOR GRANTING THE WRIT

This case presents, in the summary judgment context, the issues addressed in *Reeves v. Sanderson Plumbing Products, Inc.* 120 S.Ct. 2097, 68 U.S.L.W. 4480 (June 12, 2000). *Reeves* held that lower courts err by failing to credit the employee's prima facie case and evidence challenging the employer's "legitimate, nondiscriminatory reasons" in determining, as a matter of law, that the employee failed to prove Title VII discrimination. *Reeves*, 68 U.S.L.W at 4484. Lower courts further err by crediting the employer's self-serving testimony, when such testimony is impeached or contradicted, and by failing to draw all reasonable factual inferences in favor of the employee. *Reeves*, 68 U.S.L.W. at 4484. Finally, the Court made clear in *Reeves* that a prima facie case, combined with sufficient evidence that

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[5] The Eighth Circuit's decision makes no mention of *Reeves*.

the employer's asserted justification is false, is normally enough to get to a jury, absent a record that:

> conclusively reveals some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination occurred.

Reeves, at 68 U.S.L.W. at 4483.

In this case, the district court and the Eighth Circuit - without mention of *Reeves*, applied the very mistaken standards this Court invalidated in *Reeves*. Therefore, the Court should vacate and remand this decision for reconsideration in light of *Reeves*.

I. THE DISTRICT COURT AND THE EIGHTH CIRCUIT IGNORED CRITICAL EVIDENCE INDICATING THAT ARCH COAL SELECTED MARY BUETTNER FOR LAYOFF IN RETALIATION FOR HER OPPOSITION TO THE COMPANY'S DISCRIMINATION

Reeves established that, on summary judgment in Title VII cases, lower courts must credit the employee's evidence establishing a *prima facie* case of discrimination and challenging the employer's "legitimate, nondiscriminatory reasons" for the alleged adverse employment action. *Reeves*, 68 U.S.L.W. at 4484. Here, as in *Reeves*, the lower courts failed to credit Ms. Buettner's evidence that Arch Coal terminated her for opposing its alleged discrimination and her evidence establishing that Arch Coal's proffered reasons for these adverse actions were false.

With respect to Arch Coal's claim that Quinn's decision to select Mary Buettner over Anne O'Donnell for layoff was based upon the independent consultant Cindy Munger's recommendation, the Eighth Circuit failed to credit Buettner's evidence - derived from Arch Coal's and Munger's own documents: 1. that the consultant issued her recommendation *after* Quinn had made the decision to lay off two attorneys, including Buettner; 2. that Munger's initial recommendation was inconsistent with Quinn's decision to select Buettner for layoff instead of O'Donnell and 3. that her final recommendation was manipulated by Quinn. On this subject, the Eighth Circuit states as follows:

> Rather, for Buettner's argument [challenging the company's assertion that Quinn relied on Munger's recommendation] to raise a doubt as to the legitimacy of Quinn's claim, Buettner might have presented evidence which could have demonstrated Munger disagreed with the idea of removing two attorneys. There is no evidence to support such an inference.

(App. B18)

To the contrary, there was such evidence in the record, in Munger's initial report, which states that ..."we are really only eliminating one position...." (8th Cir. App. 579) The Eighth Circuit simply fails to credit this and other evidence of pretext. The Consultant's first report, dated September 12, 1995, three days before Buettner was laid off, recommends that only one attorney position be eliminated, and that the legal department be reorganized to include a "Senior Commercial Counsel" to whom a full time lawyer, a part-time lawyer and a paralegal would report. (8th Cir. App.

575-577;799). A reasonable inference based upon Quinn's 1994 ratings of Buettner's abilities and promotablity relative to O'Donnell, and his 1994 rating of Buettner as his number one choice for a Senior Commercial Attorney position, is that at the time of the layoff, Buettner would have been the logical choice for the Senior Commercial attorney position which the consultant recommended be retained. Two days later, in Munger's second draft dated 9/14/95, her report inexplicably eliminates the recommendation that a Senior Commercial Attorney position be retained. (8th Cir. App. 614) Such a dramatic, overnight change in the consultant's recommendation lends support to the inference that Quinn was manipulating Munger's recommendations to help justify the decision *he had already made, in August,* to lay off Buettner instead of the less senior O'Donnell. Buettner's theory that Quinn manipulated the consultant's report is buttressed by additional evidence. First, when Quinn hired Munger, he told her in a letter that her report should look independent while reflecting his views. (8th Cir. App. 547[6]). [Munger's testimony was, as the district court noted, that she recalled discussions with Quinn about "squeezing out" another position to eliminate.] (Add. C44). More than two weeks before Munger prepared her first draft, however, on August 29, Quinn reported in a memorandum to CEO Leer that he would be terminat-

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[6] Quinn's words to Munger are reflected in his memo to her: "Report needs to reflect Anderson's independent assessment of legal function. Stressing that you were free to develop your own perspective is very important. However I want the vision, the future state processes and the future state initiatives to reflect our vision with Andersen's concurrence. Report should be termed in Andersen-speak as much as possible." (8th Cir. App. 547)

ing two attorneys. Despite his claim now that he relied on Munger's recommendation, he did not have her recommendation in hand at the time he wrote that memorandum. (8th Cir. App 900) And as noted previously, her recommendation was, on its face, inconsistent with Quinn's selection of Buettner for layoff. This was critical evidence of pretext, which the Eighth Circuit either ignored or failed to credit.

II. THE LOWER COURTS IMPERMISSIBLY CREDITED THE SELF-SERVING, CONTROVERTED TESTIMONY OF ARCH COAL'S GENERAL COUNSEL, MANAGERS AND CONSULTANT

Reeves also established clear and important limitations on the extent to which lower courts could rely upon the moving party's controverted evidence in adjudicating FRCP 56 motions for summary judgment. The Court held:

> [T]he court must disregard all evidence favorable to the moving party that the jury is not required to believe. That is, the court should give credence to the evidence favoring the non-movant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.' *Reeves*, 68 U.S.L.W. at 4484 (citations omitted).

In affirming summary judgment, the Eighth Circuit relied in part on the self-serving assertions of Arch Coal's General Counsel Quinn and his consultant Cindy Munger. For example, the Eighth Circuit noted:

> Munger specifically stated in her deposition on January 20, 1999, that her recommendation to eliminate two attorneys was independent of Quinn. (citation omitted) Moreover, Munger testified that she would have said something if she disagreed with Quinn. Thus, the Court cannot find nor does Buettner point to any evidence which shows Munger's recommendation to eliminate two attorney positions was not independently made. (App. C44).

Munger is not a disinterested witness, for, as the Eighth Circuit notes, she continues to be retained by the company. (App. B7) She is a paid consultant hired by Quinn with instructions to sound independent but to reflect Quinn's views. Buettner has, in the discussion above, articulated her evidence that Munger's initial recommendation was to eliminate one position, not two; that her initial recommendation was inexplicably changed to two positions after Quinn reviewed her first recommendation and that her initial recommendation to retain a senior commercial attorney position was also thereafter changed. This is sufficient evidence to show that Munger did disagree with Quinn and that Quinn's decision was not based, as he claimed, upon her independent advice. The Eighth Circuit's failure to disregard Munger's self-serving assertion about the alleged independence from Quinn of her recommendation, especially in the face of such countervailing evidence, is inconsistent with *Reeves*.

In addition, the Court of Appeals, in dismissing the "causal link" between Buettner's expressed opposition to gender discrimination and her selection for layoff, notes that "there may be a question of fact whether Quinn knew that Buettner's statements to him consti-

tuted protected activity." (App.). Here, as in *Reeves*, Mary Buettner adduced direct evidence of Arch Coal's discrimination, which the lower courts either failed to credit or discounted. Such evidence consisted of Quinn's acknowledgment to Buettner that her boss, Patrick Panzarino, weeks before Buettner was selected for lay off, made the statement that "women and minorities could not succeed in the coal business." This is direct evidence of a corporate culture hostile to women and provides an important backdrop for Quinn's selection of Buettner for layoff. This background is relevant also to Panzarino's accusation that Buettner was "too aggressive," a criticism Buettner relayed to Quinn and one most understand to be selectively leveled at assertive women. (8th Cir. App. 438) Yet, in the face of lawyer Quinn's knowledge and even acknowledgment to Buettner of Panzarino's statements, the Eighth Circuit appears to credit Arch Coal's arguments that Quinn did not know that Buettner was complaining of discrimination! The Court notes that:

> Quinn, in his affidavit signed on February 12 1999, denies understanding any comments by Buettner as being complaints regarding discrimination. See Appendix at 250. Thus, it appears there may be a question of fact regarding Quinn's knowledge that Buettner had engaged in protected activity (App. B 13-14)

In addition the Eighth Circuit notes that Human Resource managers contend that they did not communicate to Quinn Buettner's assertion, in their meeting with her in June, that Panzarino "had a problem with women." (App. B7) The Eighth Circuit's crediting of Quinn's affidavit and the H.R. managers' claims that Quinn didn't hear about Buettner's concern that

Panzarino had a problem with women reflects a "hear no evil, speak no evil, see no evil" philosophy about discrimination, and is an improper trespass beyond the limitations upon judicial determinations of credibility as articulated in *Reeves*.

III. THE DISTRICT COURT DREW ALL REASONABLE FACTUAL INFERENCES IN FAVOR OF ARCH COAL AND AGAINST MARY BUETTNER

Finally, in *Reeves*, the Court made clear that, in adjudicating summary judgment motions in Title VII cases, lower courts must draw all reasonable factual inferences from an employee's direct and indirect evidence of discrimination and may not make credibility determinations or weigh the evidence. *Reeves,* 68 U.S.L.W. at 4484. The Eighth Circuit drew numerous inferences in favor of Arch Coal, and ignored the reasonable inferences from the evidence favorable to Buettner.

The most glaring example of this was the dismissal of the reasonable inference that Arch Coal's stated reasons for selecting Buettner for layoff were pretextual. Arch Coal General Counsel Jeffry Quinn's primary explanation for selecting Buettner instead of Anne O'Donnell for layoff was that he relied upon the independent advice of consultant Cindy Munger. Buettner's evidence of pretext with respect to the alleged independence as well as the sequence of the consultant's recommendation has been articulated and discussed above. Yet, in the face of that evidence, the Eighth Circuit credits the company's evidence of a :

> determination made during the re-engineering study of the legal department at Arch Coal that the majority of the legal work in the commercial con-

> tract area could be consolidated and performed by one less experienced attorney or a less experienced attorney and a paralegal.... *Evidence on the record supports Arch Coal's articulated non- discriminatory reason for terminating Buettner sufficient to meet its McDonnell Douglas burden for summary judgment purposes.*" (App. B17) (Emphasis added)

The Eighth Circuit here turns the rule on how inferences should be drawn on its head. The "less experienced" attorney was Anne O'Donnell. Buettner's evidence was that the consultant did not initially recommend the retention of a less experienced attorney, rather quite the opposite. She recommended the retention of a "Senior Commercial Attorney" and Jeff Quinn had, only a year earlier and prior to Buettner's complaints about discrimination, designated Buettner as his first choice for a senior commercial attorney position. The reasonable inference, favorable to Ms. Buettner which the lower courts refused to credit, was that there was no business justification for laying off two attorneys, including Buettner who was a senior commercial attorney like that Munger initially recommended be retained, and that Quinn was merely manipulating and using his consultant as a cover-up business justification for his decision to rid Arch Coal of its vocal opponent to gender discrimination, Mary Buettner. It is reasonable to infer that had Buettner not complained of discrimination, she would have been retained as the Senior Commercial Attorney initially recommended by the consultant. Yet the Eighth Circuit states that "[t]he fact that the consultant ultimately recommended there not be a senior counsel position with a higher salary merely supports Arch Coal's claims that the decision not to have a senior counsel was based upon cost and efficiency

grounds." (App). Here is an example of the Eighth Circuit drawing inferences in favor of the non-moving party, as proscribed by this Court in *Reeves*.

Arch Coal also claimed that Buettner was selected for layoff because she was performing "commodity" type work that could be performed by a less experienced attorney or a paralegal who would be paid less. Yet the consultant's own documents and Quinn's earlier words belie the contention that Buettner's work was "commodity-like". (8th Cir. App 610) O'Donnell was principally doing real estate work. (8th Cir. App. 610, 798) Buettner's work in coal sales is reflected in the consultant's report as the most "experiential" and least "commodity"-like work, more so than real estate work. (8th Cir. App 573). Quinn admitted in his deposition that Buettner's work in coal sales was the most complex area of commercial legal work performed in Arch Coal's legal department. (8th Cir. App 457). The Eighth Circuit does not discuss or credit Buettner's evidence in this regard, but rather adopts, without explanation, Arch Coal's assertion that Buettner's work was "commodity-like" (App. B18)and dismisses Buettner's evidence as failing to "address whether her discharge could affect cost and efficiency at Arch Coal". (App. B19) The court further proclaims that Buettner has failed "to rebut Arch Coal's assertion that Buettner was discharged for cost and efficiency purposes." (App. B19) Again, here is the lower court drawing all reasonable inferences in favor of the non-moving party.

A final example of the lower court's pattern of drawing reasonable inferences against Ms. Buettner is the Eighth Circuit's characterization of certain of Buettner's evidence of a causal connection between her opposition to discrimination and her selection for layoff. The court

states: "[h]ere, Buettner's primary evidence of a causal connection was that Panzarino had said that all the "troublemakers" would be let go in the reorganization." (App. B 14, 15) While Ms. Buettner never characterized this evidence as her "primary" evidence of causation,[7] she did offer it as direct evidence of the company's retaliatory corporate culture. Yet the Eighth Circuit refuses even to draw an inference of retaliatory motive from this statement, instead requiring Ms. Buettner to adduce additional evidence that "persons who complained about illegal procedures were considered "troublemakers...." (App. B15). Surely, a logical and reasonable inference could be drawn that persons who complain of illegal practices might be considered by the company to be "troublemakers". Again, here is the Eighth Circuit refusing to draw a reasonable inference in favor of Ms. Buettner.

The above examples illustrate how the lower courts in this case, at variance with *Reeves,* resolved all reasonable inferences against Ms. Buettner by holding that her direct and indirect evidence of a causal connection between her opposition to discrimination and her termination, and further that her evidence of pretext was insufficient to meet her burden of proof in the summary judgment context.

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[7] Ms.Buettner's evidence of causation includes the following undisputed facts: Her boss Patrick Panzarino first tried to fire her in mid-June, when she complained of his gender-discriminatory behavior; the proximity of Buttner's complaints of discrimination to Quinn's decision in August to lay her off; her pre-complaint status as Quinn's first choice for a Senior Commercial Attorney position initially recommended by the consultant in the re-engineering process and other evidence of pretext already discussed above.

CONCLUSION

Because the lower courts failed to apply the *Reeves* standard for summary judgment motions in Title VII cases, the Court should grant certiorari, vacate the lower court judgments, and remand this case for reconsideration in light of *Reeves*.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3348EMSL

MARY BUETTNER,
Appellant,
vs.
ARCH COAL SALES CO., INC., et al.,
Appellees.

Order Denying Petition for Reheating
and for Rehearing En Banc

The petition for rehearing en banc is denied. Judge McMillian would grant the petition. The petition for rehearing by the panel is also denied.

(5128-010199)

August 11, 2000

Order Entered at the Direction of the Court:

\s\ Michael E. Gens
MICHAEL E. GENS
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-3348

MARY BUETTNER,
Plaintiff-Appellant,
v.
ARCH COAL SALES CO., INC.
AND ARCH COAL, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: April 10, 2000
Filed: June 26, 2000

Before BOWMAN and HANSEN, Circuit Judges, and CARMAN*, Chief Judge, U.S. Court of International Trade.

CARMAN, Chief Judge.

Appellant, Mary Buettner (Buettner), appeals from the order of the United States District Court for the Eastern District Of Missouri (Jackson, J.) dated July 21, 1999, granting summary judgment in favor of appellees, Arch Coal Sales Co., Inc. and Arch Coal, Inc., and denying Buettner's retaliation and wage discrimination claims under Title VII of the Civil Rights Act of 1964, 42

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* The Honorable Gregory W. Carman, Chief Judge of the United States Court of International Trade, sitting by designation.

U.S.C. §§ 2000e-2000e-17, and the Missouri Human Rights Act (MHRA), Mo. Rev. STAT. §§ 213.010-.095. We affirm.

I. BACKGROUND[1]

Appellant, Mary Buettner, an attorney, was hired in March 1993 by appellee, Arch Coal, Inc. (AC)[2], to work in the newly created position of Vice President, Secretary, and General Counsel for co-appellee, Arch Coal Sales, Inc. (ACS), a wholly-owned subsidiary of Arch Coal, Inc. (collectively Arch Coal). Steven Carter, AC's Executive Vice President, and Jeffrey Quinn (Quinn), AC's General Counsel, interviewed and hired Buettner because they determined there was sufficient legal work to justify assigning a full time attorney to ACS. Patrick Panzarino (Panzarino), ACS's President, disagreed. Quinn testified he believed ACS was "disorganized" and that he "forced" Panzarino to accept Buettner's employment at ACS. By virtue of her position, Buettner was required to report directly to Panzarino. The record demonstrates Panzarino and Buettner had a contentious working relationship.

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[1] Apparently prior to the district court's order granting summary judgment in favor of the appellees, Arch Coal Sales Co., Inc. (ACS) and Arch Coal, Inc. (AC) (collectively Arch Coal), appellant, Mary Buettner (Buettner), amended her complaint to remove allegations that she and other women in defendant's employ were subject to a hostile work environment. *See Buettner v. Arch Coal Sales Co., et al.*, No. 4:97CV 1926, at 2 n.2 (E.D. Mo. July 21, 1999). As that allegation is moot and not raised before this Court, we focus our description of the factual background on facts pertinent to Buettner's retaliation and wage discrimination claims only.

[2] During appellant's employment, Arch Coal, Inc. was known as Arch Mineral Corporation. For the purposes of this opinion, the Court will refer to the parent corporation as Arch Coal, Inc.

The first serious dispute between Panzarino and Buettner occurred in October 1994 regarding the secretary Panzarino assigned to Buettner. According to Buettner, Panzarino was very angry about her objection to the secretary assignment and told Buettner her services were no longer required at ACS. Buettner testified three different employees told her that Panzarino instructed them not to send work to her after this incident. Panzarino testified that he never purposefully deprived Buettner of work. Buettner testified her work load gradually decreased after October 1994.

In December 1994, Buettner e-mailed Quinn that Panzarino had cut off contact with her and that his staff was writing its own legal correspondence. Buettner told Quinn she was determined not to let Panzarino force her out of her job. Quinn completed Buettner's annual evaluation which Panzarino had refused to complete in March 1994.

On March 17, 1995, Buettner e-mailed Quinn and asked him whether Panzarino was scheduled to conduct her annual review. She asked how fair a review would be from "a man who has barely spoken to [her] in the past five months and who has said that he doesn't want [her] [at Arch Coal Sales] anymore and that he doesn't think he wants [her] doing [Arch Coal Sales] work anymore." Also, Buettner stated her concern that if Panzarino did her reviews from then on, "who [would] make sure [she didn't] ... fall so far behind the male attorneys in salary that the only way to catch up [would be] to leave?"

Buettner asserted that sometime during the summer of 1995, a co-worker, Jennifer Russell, resigned in frustration at being passed over for promotion. Buettner

testified she told Quinn that Panzarino said to Russell it was "just as well that she was leaving, because women and minorities don't belong in the coal business." Quinn said he would investigate. Quinn reported to Buettner that he spoke with Panzarino and that Panzarino actually said that women and minorities "can't succeed" in the coal industry. Buettner told Quinn she found that remark even more offensive.

In June 1995, Buettner wrote Panzarino a memo stating that an increasing number of ACS agreements were being signed without her review and that employees were seeking legal advice from AC. She requested they stop doing so.

On or about June 15, 1995, Buettner and Panzarino disagreed about whether Buettner was to attend a meeting with a client. Panzarino stated in a memo drafted by him on June 19, 1995, Buettner was not invited to the meeting as the client only requested Panzarino and John Eaves attend the meeting. According to the June 19, 1995, memo, Buettner contacted the client's attorney and arranged to join the meeting without informing Panzarino.

Panzarino's memo also states that after a meeting called by Buettner, she requested an opportunity to discuss with Panzarino her role at ACS. Buettner and Panzarino agreed that they would ask Quinn and Carter to clarify Buettner's role. On June 15, 1995, Buettner e-mailed Quinn and requested that he, Carter, Panzarino, and she meet to resolve the differences between Buettner and Panzarino. In her e-mail, Buettner insinuated that Panzarino had told her that she was "too aggressive."

Joe Stearman, a member of the Arch Coal Sales staff, testified that he and Buettner had discussed the corporate reorganization that was underway in 1995. Stearman testified that in June 1995[3], Buettner told him that Panzarino was unhappy with him and might remove him from his job. Stearman confronted Panzarino. Panzarino was furious with Buettner and viewed her discussion with Stearman as a violation of a confidence. Buettner testified that Panzarino told her to pack her things and leave the building.[4] Buettner denied in her deposition that a specific event provoked Panzarino's action and asserts she never disclosed confidential information communicated to her by Panzarino. There is some dispute whether Panzarino fired Buettner, but all parties appear to agree that later in the day, Buettner spoke with Steve Leer, the President and Chief Executive Officer (CEO) of AC, who reassured her she was not fired. Buettner did not leave her employment and did not lose any pay or other benefits as a result of the action.

On June 22, 1995, Buettner met with Jane Fox, the Director of Personnel Services, and Mike McKown, the Vice President of Human Resources. The director wrote in a memorandum on that same date that she believed the problem to be "communication related compounded by personality conflicts." The director also attested in an affidavit that at the meeting Buettner "stated that there were no issues of sexual harassment." According to Buettner, when the director asked her whether Panzarino "ha[d] a problem with women," she responded

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[3] It appears from the record that this incident occurred on or about June 16, 1995.

[4] These facts describe the alleged June 16, 1995, "firing."

affirmatively. Fox and McKown testified, and Buettner does not appear to contest, that they did not communicate the content of the meeting to Quinn.

In late 1994 or early 1995, AC's President decided to embark on a reengineering of the corporation as Arch Coal's performance did not meet expectations in 1994 and hired a consulting firm, Arthur Andersen & Co., LLP (Andersen), to do the job. Ultimately, there was a reduction in force by 17.7% of the workforce at AC and its subsidiaries, including Panzarino and Buettner.

During the re-engineering, Quinn requested that someone with expertise in evaluating legal functions separately conduct the review for the legal department. In March 1995, the company retained Cindy Munger of Altman Weil Pensa to review the legal department.[5] Munger and Quinn worked together closely, and the record contains many documents prepared at different stages of the review process. Quinn's primary objective was to reduce costs. Thus, Quinn wanted to determine whether some of the legal work could be assigned to paralegals and less experienced attorneys.

In March 1995, Arch Coal had three attorneys responsible for commercial contract legal work: Buettner in coal sales agreements and transportation; Wayne Bussell (Bussell) in general commercial contracts; and Anne O'Donnell (O'Donnell) in real estate contracts. Bussell was hired in 1988, and O'Donnell, like Buettner, was hired in 1993. In September 1995, Bussell earned

[5] At some point during the re-engineering of Arch Coal, Cindy Munger left Altman Weil Pensa to work as a legal consultant for Arthur Andersen & Co., LLP (Andersen). *See* Appendix at 173. Arch Coal continued to employ Munger as a legal consultant with Andersen. *See id.*

$100,980.00 plus a bonus; Buettner earned $78,224.00 plus a bonus; and O'Donnell earned $56,210.00 and was not eligible for a bonus.

Quinn decided to remove two of the three commercial attorneys. He selected Bussell and Buettner. O'Donnell assumed the work of Buettner and Bussell in addition to her own. Quinn testified in deciding whether to retain Buettner or O'Donnell, he considered the consolidated position to be "more junior" to Buettner's current position. The record reflects in January 1996 after O'Donnell assumed her additional work, her salary increased to $64,000-still less than Buettner's salary at the time of her discharge, $78,224. Quinn also testified that while Bussell was offered a nonlegal position elsewhere in the company, Buettner had told Quinn she was not interested in work other than coal sales. Buettner asserts she told Quinn her top priority was to be employed. Buettner was laid off in September 1995.

Buettner also claims she was discriminatorily paid less than a similarly situated male attorney, Bob Jones. Buettner testified that around the time she ,was hired, Quinn told her she would be receiving less money than Bob Jones, another 1987 law school graduate. Buettner testified Quinn told her that he would "catch [her] up" to Bob Jones. Quinn testified he told Buettner he would expect over time the gap between Buettner and Jones would decrease as Buettner's performance was proven and her responsibilities increased.

Unlike Buettner, Jones had a degree in mining engineering and worked as a mining engineer for five years before going to law school. Jones was hired to work at Arch Coal on or around August 1, 1991. When Buettner was hired, Jones was the company's chief labor attorney

and handled employment law and safety matters. Jones also supervised another attorney. At some point, Jones had primary responsibility for litigation in the company.

11. STANDARD OF REVIEW

We review a grant of summary judgment de novo. *See Bailey v.* U.S.P.S., 208 F.3d 652, 654 (8th Cir. 2000). The question before the district court, and this court on appeal, is whether the record, when viewed in the light most favorable to the non moving party, shows there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see, e.g., Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986). Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *See, e.g., Crain v. Board of Police Comm'rs,* 920 F.2d 1402, 1405-06 (8th Cir. 1990).

111. DISCUSSION

A. Retaliation

Buettner claims Arch Coal unlawfully retaliated against her by "firing" her on June 16, 1995, and by terminating her in September 1995 for expressing a belief that her employer had engaged in discriminatory acts. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, makes it unlawful for an employer to discriminate against an employee, for among other things, "because [s]he has opposed any practice made an unlawful employment practice by this subchapter." In the absence of direct evidence of discrimination, the burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S.

792 (1973), applies to claims of retaliation. *See Womack v. Munson,* 619 F.2d 1292, 1296 (8th Cir. 1980); *see also Cobb v. Anheuser Busch, Inc.,* 793 F. Supp. 1457, 1489 (E.D. Mo. 1990). Under the burden-shifting analysis, the plaintiff must first establish a prima facie case of retaliatory discrimination. *See McDonnell Douglas, 411 U.S.* at 802. To establish a prima facie case of retaliatory discrimination, a plaintiff must show: (1) she engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal connection existed between participation in the protected activity and the adverse employment action. *See Kiel v. Select Artificials, Inc.,* 169 F.3d 1131, 1136 (8th Cir. 1999) (en banc), *cert. denied,* 120 S. Ct. 59 (1999). The same standards apply to MHRA retaliation claims. *See Cross v. Cleaver,* 142 F.3d 1059, 1076 (8th Cir. 1998).[6]

Once the plaintiff establishes a prima facie case of retaliation, the burden shifts to the employer to produce some legitimate, non-discriminatory reason for the adverse action. *See Womack, 619* F.2d at 1296. If the employer satisfies this burden, the plaintiff must prove the proffered reason is a pretext for retaliation. *See id.* Ultimately, the plaintiff must establish the employer's adverse action was based on intentional discrimination.

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[6] Neither Buettner nor Arch Coal alleges the applicable law in this case should be the law of a "reduction in force" cause of action. *See, e.g., Herrero v. St. Louis Univ. Hosp.,* 109 F.3d 481, 483-84 (8th Cir. 1997). Rather, Buettner's sole argument regarding her termination is that she was terminated because she expressed her belief that her employer had engaged in discriminatory acts. Buettner does not claim that she was terminated because of her age, race, or ethnic origin, as required for a "reduction in force" cause of action. *See id.* Therefore, this Court will not apply a "reduction in force" analysis in this case.

See Ryther v. KARE 11, 108 F.3d 832, 837-38 (8th Cir. 1997) (en banc) (applying the *McDonnell Douglas* burden shifting analysis in an age discrimination case).

A finding of unlawful retaliation, however, is not conditioned on the merits of the underlying discrimination complaint. *See generally Davis v. State Univ. of New York,* 802 F.2d 638, 642 (2d Cir. 1986). Title VII's prohibition against retaliatory discrimination protects activities ranging from filing a complaint to expressing a belief that the employer has engaged in discriminatory practices. *See, e.g., Wentz v. Maryland Casualty, Co.,* 869 F.2d 1153, 1154-55 (8th Cir. 1989) (applying the approach taken under Title VII to claim of retaliatory discharge under the Age Discrimination in Employment Act). A plaintiff need not establish the conduct which she opposed was in fact discriminatory but rather must demonstrate a good faith, reasonable belief that the underlying challenged conduct violated the law. *See id.* at 1155.

Regarding the first prong in her prima facie case for retaliation, protected activity, sufficient evidence appears to exist on which a jury could reasonably believe Buettner engaged in protected activity. While it is unclear whether any of the statements on which Buettner relies to prove she engaged in protected activity actually would constitute evidence of discrimination[7], Buettner

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[7] Buettner cites the following facts to support her argument that she engaged in protected activity: (1) on March 17, 1995, Buettner wrote to Jeffrey Quinn (Quinn) regarding her concern that Panzarino would not conduct a fair evaluation of her and that she might fall behind male employees in salary; (2) on June 15, 1995, Buettner e-mailed Quinn implying Patrick Panzarino (Panzarino) called her "too aggressive"; (3) Buettner complained to Quinn that

(Continued on next page).

must only demonstrate a good faith, reasonable belief that the underlying challenged action violated the law. *See id.* In viewing the record in the light most favorable to the non-moving party, we believe a jury could find Buettner had a good faith, reasonable belief that at least one of the statements she relayed to Quinn violated the law. Specifically, Buettner stated in her deposition of July 24, 1998, that she thought it was "very discriminatory [for Panzarino] to say that women and minorities don't belong in the coal business." Appendix at 445. Without determining whether Panzarino's comment would be sufficient to prove discrimination, we believe Buettner could demonstrate a good faith, reasonable belief that the challenged conduct violated the law.

Regarding the second prong, adverse employment action, we agree with the district court that Buettner failed to show any materially adverse employment action with regard to the June 16, 1995, "firing." Employment actions which do not result in changes in pay, benefits, seniority, or responsibility are insufficient to sustain a retaliation claim. *See, e.g., Flannery v. Trans World Airlines, Inc.,* 160 F.3d 425, 428 (8th Cir. 1998).[8]

(Footnote 7 continued.)

Panzarino made a discriminatory comment to co-worker, Jennifer Russell; and (4) Buettner told Jane Fox, Director of Personnel Services, and Mike McKown, Vice President of Human Resources, on June 22,1995, that Panzarino had a "problem with women."

[8] Citing *Keeney v. Hereford Concrete Products, Inc.,* 911 S.W.2d 622 (Mo. 1995) (en banc), Buettner argues the Missouri courts define retaliation under the Missouri Human Rights Act (MHRA) more broadly than under Title VII of the Civil Rights Act of 1964, 42 U. S.C. §§ 2000e-2000e- 17, and, therefore, at minimum, under the MHRA, Panzarino's attempt to fire Buettner in June

(Continued on next page.)

Here, Buettner does not offer any evidence that the confrontation with Panzarino resulted in any materially significant disadvantage to Buettner. Indeed, she retained her job with ACS. Thus, Buettner's claim of retaliation with respect to the June 16, 1995, confrontation does not survive summary judgment. Buettner's termination in September 1995, however, unquestionably constitutes adverse employment action.

Regarding the third prong, causal link, we agree with the district court that it does not appear Buettner has shown evidence of a causal link between her complaints of discrimination and her dismissal in September 1995. First, there may be a question of fact whether Quinn knew that Buettner's statements to him constituted protected activity. A plaintiff must show the employer had actual or constructive knowledge of the protected activity in order to establish a prima facie case of retaliation. *See Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 818 (8th Cir. 1998) (citing *Simon v. Simmons Foods, Inc.*, 49 F. 3 d 386, 389 (8th Cir. 1995)). One of Buettner's strongest factual assertions concerns Panzarino's statement regarding women and minori-

(Footnote 8 continued.)

1995 constitutes a retaliatory act under Missouri law. This Court, however, has interpreted *Keeney* narrowly and has determined there is effectively "[no] difference between proof that there was a causal connection between the employee's protected activity and adverse employment action, the remaining elements of a Title VII retaliation claim, and proof that 'as a direct result [of protected activity], [the employee] suffer[ed] any damages due to an act of reprisal,' the second element of a retaliation claim under the MHRA." *Cross v. Cleaver,* 142 F.3d 1059, 1076 (8 th Cir. 1998) (quoting *Keeney,* 911 S.W.2d at 625-26). Thus, we find Buettner's argument regarding the breadth of the MHRA unpersuasive.

ties in the coal business.[9] Buettner stated in her deposition testimony on July 24, 1998, that she told Quinn she felt Panzarino's statement concerning women and the coal industry was an indication of discrimination. *See* Appendix at 445. Quinn, in his affidavit signed on February 12, 1999, denies understanding any comments by Buettner as being complaints regarding discrimination. *See* Appendix at 250. Thus, it appears there may be a question of fact regarding Quinn's knowledge that Buettner had engaged in protected activity.

Notwithstanding there may be a question of fact regarding whether Quinn had knowledge of the protected activity, Buettner appears not to proffer sufficient evidence of a causal link between her complaints of discrimination and her dismissal that would preclude summary judgment. The requisite causal connection may be proved circumstantially by showing the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive. *See, e.g., Rath v. Selection Research, Inc.*, 978 F.2d 1087, 1090 (8th Cir. 1992). Here, Buettner's primary evidence of a causal connection was that Panzarino had said that all the "troublemakers" would be let go in the reorganiza-

[9] Buettner also argues the following incidents lead to an inference that her employer knew she was complaining of discriminatory behavior: (1) Buettner's e-mail to Quinn that she was concerned she would "fall so far behind the male attorneys and [sic] salary that the only way to catch up [would be] to leave," Appendix at 101; (2) Buettner's statement that Quinn in Buettner's initial Job interview told her he would even her salary with that of Bob Jones, like Buettner, a 1987 law school graduate; (3) Buettner's e-mail to Quinn inferring Panzarino criticized her for being "too aggressive"; and (4) Buettner's statement to human resources that Panzarino "had a problem with women."

tion. Buettner, however, proffers no evidence that persons who complained about illegal procedures were considered "troublemakers" nor that Buettner herself had been called a "troublemaker." The only other evidence to which Buettner can point from which a jury might infer a causal connection is the closeness in time between her complaints of gender discrimination in pay and working conditions beginning in December 1994 through her last significant complaints in June 1995 and her termination in September 1995. Generally, however, more than a temporal connection between protected activity and an adverse employment action is required to show a genuine factual issue on retaliation exists. *See Kiel,* 169 F.3d at 1136; *see also, e.g., Feltmann v. Sieben, 108* F.3d 970, 977 (8th Cir. 1997) (in Title VII retaliatory discharge claim plaintiff fired six months after the complaint; without more, temporal proximity found to be insufficient to show causal link)[10]; *Nelson v. J.C. Penney Co.,* Inc., 75 F.3d 343, 346-47 (8th Cir. 1996) (plaintiff fired a month after he filed age discrimination charge failed to establish causal link without evidence in addition to temporal proximity); *Caudill v. Farmland Indus., Inc.,* 919 F.2d 83, 86-87 (8th Cir. 1990) (closeness in time between plaintiff's filing of charges and plaintiffs discharge was a mere "slender reed of evidence"; any conclusion of temporal proximity would be "rank

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[10] Similarly, in a cause of action for retaliatory discharge under Missouri law in the same case, the Court found where only six weeks had passed between report of forged checks and the plaintiff's discharge, temporal proximity alone was insufficient to establish a causal link between plaintiff's complaint and her discharge.

speculation").[11] We decline, however, to determine specifically at this time whether temporal proximity alone would be sufficient to create an inference of a causal connection in this case as Buettner's failure of proof is even more obvious when we focus on the pretext stage of the *McDonnell Douglas* inquiry.

In support of Arch Coal's motion for summary judgment, Arch Coal submitted evidence of a legitimate, non-discriminatory reason for Buettner's discharge-as a result of a reduction-in- force for reducing costs and improving efficiency. Arch Coal's claim that the decision to eliminate Buettner's position was for reducing costs and increasing efficiency is supported by evidence of a determination made during the re-engineering study of the legal department at Arch Coal that the majority of the legal *w*ork in the commercial contract area could be consolidated and performed by one less experienced attorney or a less experienced attorney and a paralegal. *See* Appendix at 141-43, 366, and 185. Evidence in the record also supports the fact that Buettner and Bussell, the two attorneys Quinn laid off as a result of the reengineering study, were the highest paid among the three attorneys working in the commercial contract

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[11] This finding is not contradicted by this Court's recent decision in *Bassett v. City, of Minneapolis,* No. 99-1147, 2000 WL 371135 (8th Cir. April 12, 2000). In *Bassett,* the court determined a causal connection existed sufficient to create an inference of retaliation in a summary judgment motion where, in addition to temporal proximity, a pattern of increasing levels of discipline persisted. Further, while Bassett was disciplined for these infractions, Bassett's peers who committed similar infractions were not disciplined. Here, unlike in *Bassett,* no additional evidence other than proximity in time exists linking the employee's protected activity with the adverse employment action.

area. *See* Appendix at 213. Quinn decided to retain the less experienced, lower salaried, and allegedly more productive attorney, Anne O'Donnell. *See* Appendix at 251-52. Evidence on the record supports Arch Coal's articulated non-discriminatory reason for terminating Buettner sufficient to meet its *McDonnell Douglas* burden for summary judgment purposes.

Buettner fails to discredit Arch Coal's factual allegations that she was terminated as a result of the reduction-in-force in the legal department at Arch Coal. For a plaintiff to survive summary judgment, she must adduce enough admissible evidence to raise genuine doubt as to the legitimacy of a defendant's motive, even if that evidence does not directly contradict or disprove a defendant's articulated reasons for its actions. *See Davenport v. Riverview Gardens Sch. Dist.*, 30 F.3d 940, 945 n.8 (8th Cir. 1994). The Court believes, viewing the evidence in the light most favorable to Buettner, she has not presented evidence from which a reasonable jury could conclude Arch Coal's legitimate, non-discriminatory reason for discharging Buettner was pretextual.

First, Buettner asserts Arch Coal's statement that the decision to terminate Buettner and Bussell was based on the recommendation by Arthur Andersen consultant, Cindy Munger, was pretext to conceal Quinn's true intention of removing Buettner. To support her claim, Buettner points to a memo from Quinn to the CEO of AC stating Quinn "anticipate[s] that replacing two lawyers with two paralegals will result in cost savings of $130,000." Appendix at 535. This memo was drafted two weeks before Quinn received the consultant's initial recommendation. Additionally, Buettner alleges Munger in one of her initial memos to

Quinn recommended only one position be eliminated.[12] Buettner further asserts Quinn instructed Munger that the final report should appear as an independent Andersen analysis. It is clear from evidence in the record that the re-engineering process was collaborative between Quinn and Munger. *See* Appendix at 140-42 and 185. Thus, Buettner's allegation that Quinn may have anticipated laying off two attorneys before receiving an initial report from Munger does not raise a doubt as to the legitimacy of Quinn's claimed reliance on Munger's final recommendation. Rather, for Buettner's argument to raise a doubt as to the legitimacy of Quinn's claim, Buettner might have presented evidence which could have demonstrated Munger disagreed with the idea of removing two attorneys. There is no evidence to support such an inference. Munger specifically stated in her deposition on January 20, 1999, that her recommendation to eliminate two attorneys was independent of Quinn. *See* Appendix at 143. Moreover, Munger testified she would have said something if she disagreed with Quinn. *See id.* Thus, the Court cannot find nor does Buettner point to any evidence which shows Munger's recommendation to eliminate two attorney positions was not independently made.

Second, Buettner argues Arch Coal's claim that the commodity-type work in which Buettner was engaged was work which could be done by a less experienced attorney or paralegal is pretextual. Buettner states that Quinn admitted her work was the most complex com-

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[12] The memo from the consultant, Cindy Munger, to Quinn states, "Downsize by two lawyers-- we are really only eliminating one position, not two if you plan to put a contract person in there." Appendix at 579.

mercial work done by the legal department. Buettner also states that at the beginning of the re-engineering study Quinn believed there was plenty of work in Buettner's division to keep a full time attorney busy. Further, Buettner cites evidence showing she was ranked above Russell and O'Donnell in position for advancement. None of Buettner's evidence, however, discredits Arch Coal's factual allegation that Buettner was dismissed for cost and efficiency purposes. Buettner's references to her abilities, the nature of the work she performed, and her position for promotion do not address whether her discharge could affect cost and efficiency at Arch Coal and therefore fail to rebut Arch Coal's assertion that Buettner was discharged for cost and efficiency purposes.

Buettner's only evidence that challenges Arch Coal's articulated legitimate nondiscriminatory reason for retaining the least skilled, lowest paid of the three commercial attorneys also fails to raise doubts as to the legitimacy of Arch Coal's motives. Buettner claims the consultant's report dated three days before Buettner was laid off recommends retaining one senior commercial counsel. Buettner asserts she would be the natural choice as Buettner had initially been hired to take over the coal sales work Bussell could not handle, and O'Donnell had no experience in the area of coal sales contracts. Moreover, Buettner states the recommendation to establish a senior commercial counsel was eliminated two days later. This, Buettner argues, provides sufficient evidence from which a jury may infer Quinn was manipulating the consultant's recommendations to justify his retaliatory decision to lay off Buettner. Buettner also claims that although Quinn testified O'Donnell took over all Buettner's coal sales work after

Buettner was laid off, O'Donnell testified she did very little coal sales work after the layoffs. Buettner points to additional evidence that billing records to outside counsel increased throughout 1996, implying there was more work than O'Donnell could handle. Buettner's allegations, however, fail to challenge the legitimacy of Arch Coal's non-discriminatory reason for laying off Buettner. The fact that the consultant ultimately recommended there not be a senior counsel position with a higher salary merely supports Arch Coal's claims that the decision not to have a senior counsel was based on cost and efficiency grounds. Arch Coal challenges Buettner's allegation that the coal sales work remained a significant area of work after her termination and that outside counsel needed to be brought in. Even assuming, *arguendo,* Buettner's allegations were true, whether the workload remained the same or increased after Arch Coal laid off the two attorneys does not show evidence of pretext but rather only whether Arch Coal made a good or a poor business decision in firing the two attorneys.

Buettner additionally argues Quinn's own ambitions belie the legitimacy of Arch Coal's articulated reason for laying off Buettner. Buettner claims evidence in the record shows Quinn had ambitions to move up into a non-legal, high-level position with the company at the beginning of the re-engineering process. Buettner argues the fact that Quinn did not decide to lay off Buettner until sometime after she complained about Panzarino and his remark regarding women and minorities implies Quinn wanted to get rid of Buettner because he feared her complaints of gender discrimination would prevent him from moving up in the company. There is no evidence, however, short of pure speculation, which Buettner proffers to support her theory.

Thus, in her attempt to avoid summary judgment, Buettner failed to discredit Arch Coal's articulation of a legitimate, non-discriminatory reason for terminating Buettner.

A plaintiff facing a summary judgment motion cannot "get to a jury without 'any significant probative evidence tending to support the complaint.'" *Anderson,* 477 U.S. at 249 (quoting *First Nat'l Bank of Az. v. Cities Serv. Co.,* 391 U.S. 253, 290 (1968)). To avoid summary judgment, the non-movant must make a sufficient showing on every essential element of its claim on which it bears the burden of proof. *See Osborn v. E.F. Hutton & Co., Inc.,* 853 F.2d 616, 618 (8th Cir. 1988). After careful review of the district court's decision and the arguments of the parties de novo, this Court concludes that the district court properly granted summary judgment on Buettner's Title VII and Missouri Human Rights Act retaliation claims.

B. Wage Discrimination

Buettner argues she established a prima facie case of wage discrimination under Title VII warranting trial. The Eighth Circuit has held that Equal Pay Act, 29 U.S.C. § 206(d) (1994), standards apply to Title VII claims of "unequal pay for equal work." *McKee v. Bi-State Dev. Agency,* 801 F.2d 1014, 1018 (8th Cir. 1986). Accordingly, to establish a prima facie case of wage discrimination based on unequal pay, a plaintiff must show that the defendant paid male workers more than she was paid for equal work in jobs that required equal skill, effort, and responsibility and were performed under similar conditions. *See* Equal Pay Act, 29 U.S.C. §206(d); *see also McLaughlin v. Esselte Pendaflex Corp.,* 50 F.3d 507, 513 (8th Cir. 1995).

Whether two jobs entail equal skill, effort, or responsibility requires practical judgment on the basis of all the facts and circumstances of a particular case. *See McLaughlin,* 50 F.3d at 513 (citing *Krenik v. County of Le Suer,* 47 F.3d 953, 960 (8th Cir. 1995)). Skill includes such considerations as experience, training, education, and ability. *See id.* Effort refers to physical or mental exertion needed to perform the job. *See id.* Responsibility concerns the degree of accountability required in performing a job. *See id.* The plaintiff bears the burden of establishing that the positions involve equal work. *See Corning Glass Works v. Brennan,* 417 U.S. 188, 195 (1974). If the plaintiff establishes a prima facie case, the burden shifts to the defendant to prove the pay differential is based on a factor other than gender. *See id.* at 196-97.

Buettner compares her level of compensation with that of Bob Jones. Buettner states that both she and Jones graduated from law school in the same year, had similar duties and responsibilities during the period in which Buettner worked for ACS, and Buettner had worked longer in-house at a coal company than Jones. Buettner argues any additional responsibilities Jones had were acquired later, after Buettner left ACS's employ. Buettner points to evidence that Quinn acknowledged the pay differential between her and Jones and stated that he was going to try and "catch up" Buettner to Jones's salary. Buettner argues Quinn's contention that he qualified the statement by saying the catching up depended on Buettner receiving greater responsibility and the fact that Buettner does not recall such a statement raises a genuine issue of material fact warranting trial.

Although evidence shows Jones received more pay than Buettner, Buettner did not show she and Jones had similar responsibilities, seniority, or background. Although Jones and Buettner graduated from law school in 1987, Buettner acknowledges that Jones had two years more experience at ACS, had a greater depth of mining industry experience, and supervised another attorney while Buettner did not. *See* Appendix at 446. Additionally, although Buettner claims Jones did not have litigation responsibilities at the time she was hired to work at ACS, Quinn testified at his deposition on January 8, 1999, that Jones handled the primary responsibility for litigation at the time Buettner was hired. *See* Appendix at 170. Buettner does not provide sufficient evidence to the contrary.[13] As Buettner failed to establish that she and Jones had similar responsibilities, seniority, or background, whether Quinn qualified his statement concerning "catching" Buettner up to Jones's salary is irrelevant. Rather, on the basis of the facts presented by Buettner, she has failed to establish a prima facie case of discrimination based on equal pay. Accordingly, this Court finds the district court did not err in granting summary judgment in this matter.

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[13]There is no genuine issue of fact here. Although Buettner, in her brief, denies Jones had litigation responsibility at the time she was hired by ACS, the evidence to which Buettner cites merely states that she did not believe he had those responsibilities at that time. *See* Appendix at 446. Thus, there is no question of fact on this issue.

IV. CONCLUSION

For the reasons stated above, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.UNITED STATES DISTRICT COURT

APPENDIX C
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARY BUETTNER,
Plaintiff,
v.
ARCH COAL SALES CO., et al.,
Defendants.

No. 4:97CV1926 (CEJ)
[Filed July 21, 1999]

MEMORANDUM AND ORDER

This matter is before the Court on defendants', motion for summary judgment. Plaintiff opposes the motion and the issues have been fully briefed.

Plaintiff Mary Buettner, an attorney, was hired in March 1993 by defendant Arch Coal Sales Company, Inc. (Arch Coal Sales), a wholly-owned subsidiary of defendant Arch Coal, Inc. (Arch Coal).[1] Plaintiff's position was terminated in September 1995 during a reduction in force. Plaintiff alleges that she was selected for termination in retaliation for her complaints about discriminatory treatment. In addition, plaintiff asserts that her supervisor attempted to fire her in June 1995 and that she was discriminatorily paid less than a comparable male employee. She brings retaliation and wage discrimination claims under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.*, and the Missouri

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[1]During plaintiff's employment, Arch Coal, Inc. was known as Arch Mineral Corporation. For the purposes of this memorandum, the Court will refer to the parent corporation as Arch Coal.

Human Rights Act (MHRA), Mo. Rev. Stat. §§ 213.010 *et seq.*[2] Defendants move for summary judgment, arguing that plaintiff cannot show that its employment decisions were improperly motivated by retaliation or by plaintiff's gender.

I. Relevant Factual Background

Plaintiff Mary Buettner was hired in March 1993 for the newly created position of Vice President, Secretary and General Counsel of Arch Coal Sales. Arch Coal Sales, a subsidiary of Arch Coal, Inc., had not previously had a full-time attorney, instead obtaining assistance from Arch Coal's legal department on an as-needed basis. Arch Coal's General Counsel, Jeffry Quinn, determined that there was sufficient legal work to justify assigning a full-time attorney to Arch Coal Sales. Patrick Panzarino, Arch Coal Sales' President, disagreed.

Plaintiff was interviewed and hired by Quinn and Steven Carter, Arch Coal's Executive Vice President. Although the position reported directly to Panzarino,[3] he did not interview plaintiff, nor did he set her grade and compensation levels. Quinn testified at deposition that he viewed Arch Coal Sales as "very disorganized" and that he "forced" plaintiff on Panzarino. Panzarino testified that he felt that he had no authority over plaintiff. As the record amply demonstrates, plaintiff and Panzarino had a contentious working relationship.

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[2]Plaintiff recently amended her complaint to remove allegations that she and other women in defendants, employ were subjected to a hostile work environment. Accordingly, defendants' arguments directed to such allegations are now moot.

[3]Plaintiff had a "dotted-line" relationship with Jeffry Quinn.

Plaintiff initially occupied an office in the legal services department. She relocated to an office next to Panzarino's at Arch Coal Sales during the summer of 1994. The first serious dispute between plaintiff and Panzarino that is reflected in the record arose in October 1994, regarding the assignment of secretarial staff to Arch Coal Sales. Plaintiff disagreed with Panzarino's plan and asked Quinn to intervene. Panzarino was very angry with plaintiff and told her that her services were no longer required. According to plaintiff, her relationship with Panzarino steadily deteriorated after this dispute.

Plaintiff asserts that three different employees told her that Panzarino instructed them not to send work to plaintiff. The record does not contain direct testimony from these three employees. Panzarino testified at deposition that, while he continued to believe that his department did not require a fulltime attorney, he encouraged his subordinates and their employees to refer legal work to plaintiff. Plaintiff testified, however, that she worked approximately fifty hours per week on Arch Coal Sales legal work before the October 1994 dispute and about two hours per day thereafter.

The parties submit a series of e-mail messages between plaintiff and Quinn regarding her relationship with Panzarino. In December 1994, plaintiff complained to Quinn that Panzarino had cut off contact with her and that his staff were writing their own legal correspondence. She told Quinn that she was determined not to let Panzarino force her out of her job. In December 1994, Quinn completed plaintiff's annual evaluation, which had been due in March 1994, because Panzarino had refused to do so, saying that he had no input regarding

plaintiff's activities and thus had no basis for evaluating her.

Plaintiff asserts that Panzarino also refused to complete her evaluation in the spring of 1995. On March 17, 1995, via e-mail, she asked Quinn whether Panzarino was scheduled to conduct her review. She asked,

> How fair a review will I get from a man who has barely spoken to me in the past five months and who has said he doesn't want me down here anymore and that he doesn't think he wants me doing [Arch Coal Sales] work anymore? Also, if [Panzarino] does my reviews from now on, who will make sure I don't . . - fall so far behind the male attorneys in salary that the only way to catch up is to leave?

Plaintiff testified that her concern regarding salary was based upon her experience at another company where female employees were paid less than male employees. Panzarino did complete a 1995 evaluation, consistently rating plaintiff's performance at the high end of the scale. Plaintiff received a merit increase in April 1995.

Plaintiff asserts that some time during the summer of 1995, Jennifer Russell, an Arch Coal Sales employee, resigned in frustration at being passed over for promotion. Plaintiff testified at deposition that Russell told her that Panzarino said that it was "just as well she was leaving, because women and minorities don't belong in the coal business." Plaintiff reported the remark to Quinn, who discussed it with Panzarino. Quinn reported back to plaintiff that Panzarino actually said that women and minorities "have a tough time" or "can't

succeed" in the coal industry. Plaintiff told Quinn that she found that remark even more offensive.[4]

Numerous documents were generated in June 1995 surrounding several disputes between plaintiff and Panzarino. On June 9, 1995, plaintiff sent a memo to Panzarino and his subordinates stating that "an increasing number of Arch Coal Sales agreements" were being signed without her review. Plaintiff further stated that she would have rejected some of the agreements had she seen them before their execution. Finally, plaintiff stated that she was aware that Arch Coal Sales employees were seeking legal advice from Arch Coal employees and asked them to cease doing so. Two of the persons who reported to Panzarino wrote responses stating that they and their employees had plaintiff review all new or long-term contracts.

On or about June 15, 1995, plaintiff and Panzarino had a dispute regarding whether she was invited to attend an out-of-town meeting with a client. Panzarino testified that the client had requested that the meeting be held without any attorneys present. Panzarino, who had a long-standing relationship with the client, agreed. According to a memo drafted by Panzarino on June 19,

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[4]In opposing summary judgment, plaintiff argues that her conversation with Russell occurred on June 16, 1995, that Panzarino observed their conversation, walked by them twice, "and likely overhear[d]" their conversation. The record contains no evidence to support plaintiff's statement that Panzarino observed Russell and plaintiff together. Furthermore, during her deposition, plaintiff was unable to identify when her conversation with Russell occurred and certainly did not cite it as a factor contributing to Panzarino's wrath toward her on June 16, 1995. Finally, Quinn testified that he addressed the "women and minorities" comment with Panzarino after the June 16, 1995 incident.

1995, plaintiff independently contacted the client's attorney and arranged to attend the meeting without informing Panzarino, who subsequently learned of it from the client.

Panzarino's memo also relates that plaintiff called a meeting on June 15, 1995, at which plaintiff and Panzarino got into a dispute regarding which transactions she needed to approve. Plaintiff and Panzarino agreed that they would ask Quinn and Carter to clarify plaintiff's role at Arch Coal Sales. Panzarino noted in his June 19, 1995 memo, however, that he complained to plaintiff regarding her arrogant and confrontational tone. Plaintiff allegedly responded that Quinn had warned her that the Arch Coal Sales people "rode rough shod" over attorneys. She told Panzarino that she had "real backbone" and wouldn't be pushed around.

Plaintiff e-mailed a request to Quinn after her meeting with Panzariño on June 19, 1995 asking him to set up a meeting to discuss the appropriate role for the Arch Coal Sales attorney. In her e-mail, plaintiff noted that Panzarino told her that she was "too aggressive." Quinn responded, "I just hate it when attorneys are aggressive don't you? That's one of the strangest comments I have ever heard. I thought people usually complained that their attorneys were not aggressive enough."

Kim Brennell, Arch Coal Sales' executive secretary, wrote a memo regarding a discussion she had with plaintiff on June 15, 1995. According to Brennell's memo, plaintiff had asked Brennell to provide her with copies of all correspondence from the sales people. Brennell explained that Panzarino had instructed her to provide plaintiff with copies only of contract-related documents, excluding spot transactions and shipment

schedules. Plaintiff and Brennell apparently also discussed the "hard feelings" in the department and plaintiff's conflict with Panzarino.

Joe Stearman, a member of the Arch Coal Sales staff, testified that he and plaintiff had a friendly relationship and would talk most mornings. Stearman and plaintiff often discussed the corporate reorganization that was under consideration during 1995. Stearman believed that his job was secure. On June 16, 1995, Stearman testified, plaintiff told him that Panzarino was unhappy with him and might remove him from his job. According to Stearman, plaintiff encouraged him to confront Panzarino. Stearman testified that he was extremely upset and went to Panzarino's office. When Stearman told Panzarino what his concern was, Panzarino became redfaced and angry and stormed into plaintiff's office.

Panzarino testified that he was furious with plaintiff about what he viewed as her violation of a confidence. According to Panzarino, he had "some angry words" with plaintiff. Plaintiff testified that Panzarino told her to pack her things and leave the building. Contrary to her arguments in opposing summary judgment, plaintiff denied at deposition that a specific event provoked Panzarino's action, stating that it was simply the culmination of the hostility that began in October 1994. Although plaintiff denied having a clear recollection of a conversation with Stearman that morning, she has not refuted his testimony regarding the substance of

their conversation, denying only that she "betrayed a confidence" in talking to Stearman.[5]

Although the parties dispute whether Panzarino told plaintiff that she was fired, they agree that she spoke to Quinn and Arch Coal's President, Steven Leer, who reassured her that Panzarino could not fire her. Indeed, plaintiff testified that when she told Quinn, he responded that Panzarino had -sealed his fate."[6] The parties also agree that plaintiff did not leave her employment on that day.

On June 22, 1995, plaintiff met with Jane Fox, Director of Personnel Services, and Mike McKown, Vice President of Human Resources. Fox wrote a note following the meeting which states, "The problems appear to be communication related compounded by personality conflicts. [Plaintiff] stated that there were no issues of sexual harassment when I asked her." Plaintiff does not contest the accuracy of these statements. She testified at her deposition, however, that Fox asked her if Panzarino had "a problem with women," to which she responded affirmatively. Plaintiff went on to say that Fox and McKown acknowledged that "problems existed with Pat Panzarino" and that even male subordinates complained about him. McKown and Fox testified, and plaintiff does not contest, that they did not communicate the content of their June 22, 1995 meeting to Quinn.

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[5]Quinn testified at deposition that plaintiff acknowledged that she had told Stearman that Panzarino was "out to get his job" because Panzarino was "two-faced with everybody." Plaintiff has not refuted this testimony.

[6]Plaintiff submits an affidavit dated March 22, 1999 in which she states for the first time that Quinn told her that he was not sure she still had a job.

On June 26, 1995, plaintiff and Panzarino met with Carter, Quinn, and Fox. Panzarino testified at deposition that he again stated that he did not need a full-time attorney on staff. Quinn and Carter disagreed. Quinn told Panzarino that he needed to follow Carter's instructions regarding plaintiff's role at Arch Coal Sales. Carter told Panzarino that if he could not find a way to comply with his wishes, he needed to find other employment. Plaintiff's testimony regarding the substance of that meeting coincides with Panzarino's representation. The parties do not cite any further conflicts between plaintiff and Panzarino after this meeting.

Arch Coal's performance did not meet expectations in 1994. In early 1995, Steven Leer, Arch Coal's President and Chief Executive Officer, decided to embark on re-engineering the corporation and, to that end, hired a consulting firm to conduct a company-wide study. Ultimately, Arch Coal implemented a reduction in force. Forty-eight employees accepted early retirement and an additional eighty-nine were terminated, for a total reduction of 17.7% of the workforce. Panzarino and plaintiff were among the employees who were terminated.

Quinn requested that a separate firm with expertise in evaluating legal functions conduct the review of the legal department. Consequently, in March 1995, Cindy Munger of Altman Weil Pensa was retained to review the legal function. Munger and Quinn worked together closely and the record contains many documents prepared at different stages of the review process. It is undisputed that Quinn's primary objective was to reduce costs and, thus, he wished to determine whether some of the legal work could be assigned to paralegals and less experienced attorneys.

In March 1995, Arch Coal had 7.5 lawyers. Three attorneys were responsible for the commercial contract legal work: Plaintiff handled coal sales agreements and transportation, Wayne Bussell handled general commercial contracts, and Anne O'Donnell handled real estate contracts. Bussell, who began at Arch Coal in 1988, had drafted coal sales agreements on an as-needed basis before plaintiff's full-time Arch Coal Sales position was created. O'Donnell, like plaintiff, was hired in the spring of 1993 to work at an Arch Coal subsidiary. In September 1995, Bussell earned a salary of $100,980 plus a bonus; plaintiff earned $78,224 plus a bonus; O'Donnell earned $56,210 and was not eligible for a bonus.

Quinn ultimately decided to remove two of the three commercial contracts attorneys, selecting Bussell and plaintiff. Anne O'Donnell assumed responsibility for plaintiff's and Bussell's work in addition to her own. Bussell was offered a nonlegal position elsewhere in the company. Quinn testified that he had no role in Bussell's re-employment with the company.

Quinn testified that in deciding whether to retain plaintiff or O'Donnell for the consolidated position, he considered that the position was designed to be "more junior" to plaintiff's current position. The record reflects that after she assumed additional responsibilities, O'Donnell's salary was increased to $64,000, while plaintiff's salary at the time of her discharge was $78,224. In addition, Quinn testified, plaintiff had told him she was not interested in work other than coal sales. Plaintiff asserts that she told Quinn that her top priority was to remain employed.

O'Donnell testified that less than five percent of her time was devoted to coal sales legal work following the reorganization. Quinn testified that he was surprised by how little coal sales work there was and attributed the reduction to the normal ebb and flow of the business cycle. Plaintiff contests defendant's characterization of the volume of coal sales work and asserts that Arch Coal Sales relied on outside counsel to complete the work she previously handled. Quinn acknowledged that he and Munger anticipated the need to use outside counsel as a temporary strategy following the reduction in force, but that, as events transpired, O'Donnell was able to handle all coal sales work.

Plaintiff also asserts that she was discriminatorily paid less than a similarly- situated male attorney, Bob Jones. Jones, like' plaintiff, graduated from law school in 1987. Unlike plaintiff, Jones had a degree in mining engineering and worked as a mining engineer in the coal industry for five years before going to law school. Jones started at Arch Coal on August 1, 1991. Quinn testified that, at the time plaintiff was hired, Jones was the company's chief labor attorney and handled employment law and safety matters. Jones also supervised another attorney. At some point, Jones handled all litigation matters throughout the company; the parties dispute when he assumed this additional responsibility.

Quinn testified that he told plaintiff that she was not going to start at the same salary that Jones was making but that he expected that, as her responsibilities increased, she and Jones would earn the same amount. In explaining the salary difference, Quinn told plaintiff that Jones took a pay cut to come to Arch Coal from his previous employer. In late 1993, however, Jones got a

big promotion and, as a result, the gap between his salary and plaintiff's increased.

II. Legal Standards

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *Agistor Leasing v. Farrow,* 826 F.2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Anderson v. Liberty Lobby. Inc.,* 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586-587 (1986); Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56 (e) Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corporation v. Catrett,* 477 U.S. 317, 322 (1986).

Title VII and the MHRA prohibit employment discrimination on the basis of gender or in retaliation for opposing discrimination. In the absence of direct evidence of discrimination, the burden-shifting analysis of *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Saint Mary's Honor Center v. Hicks,* 509 U.S. 502 (1993), applies to claims of retaliation and discrimination. *Ryther v. KARP, 11,* 108 F.3d 832, 836 (8th Cir.) (en banc), *cert.* 117 S. Ct. 2510 (1997); *Stevens v. Saint Louis Univ. Med. Ctr.,* 97 F.3d 268, 270-71 (8th Cir. 1996) (applying burden-shifting analysis to retaliation claim).

Under the burden-shifting analysis, plaintiff must first establish a prima facie case of intentional discrimination. *McDonnell Douglas,* 411 U.S. at 802; *Bashara v. Black Hills Corp-,* 26. F.3d 820, 823 (8th Cir. 1994) ; *Stevens,* 97 F.3d at 270-71. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *McDonnell Douglas,* 411 U.S. at 802. If the defendant articulates such a reason, the plaintiff must then demonstrate that defendant's reason is a pretext for discrimination. Id.; *Kobrin v. University of Minnesota,* 121 F.3d 408, 413-14 (8th Cir. 1997), *cert. denied,* 118 S. Ct. 1046 (1998). The burden of proving discrimination remains on the plaintiff at all times. *St. Mary's Honor Center,* 509 U.S. at 515-16. The plaintiff must do more at the pretext stage than discredit defendant's reason; the plaintiff must show the defendant's articulated reason is a pretext for discrimination. *Id. see also Ryther,* 108 F.3d. at 837; *Hutson v. McDonnell Douglas Corp.,* 63 F.3d 771, 777 (8th Cir. 1995).

In order to avoid summary judgment, plaintiff must present evidence that, when viewed in its entirety, (1)

creates a fact issue as to whether defendants, proffered reason is pretextual, and (2) creates a reasonable inference that an improper motive was a determinative factor in the adverse employment decision. *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996); *see also Krenik v. County of LeSueur*, 47 F.3d. 953, 958 (8th Cir. 1995). Evidence of pretext alone is not sufficient to avoid summary judgment. *Ryther*, 108 F.3d at 837.

III. Discussion

Plaintiff's Retaliation Claims

Plaintiff alleges that she was subject to retaliation on two occasions - Panzarino's "firing" of her on June 16, 1995 and her termination in the reduction in force in September 1995.

In order to establish a prima facie case of retaliation under Title VII, plaintiff must show (1) that she engaged in protected activity; (2) that she suffered adverse employment action; and (3) a causal connection between the two. *Kiel v. Select Artificials, Inc.*, 169 F.3d. 1131, 1136, (8th Cir. 1999) (en banc); *Smith v. St. Louis Univ.*, 109 F.3d 1261, 1265-66 (8th Cir. 1997).[7] The same standards apply to MHRA retaliation claims brought by

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[7]The Eighth Circuit Court of Appeals has not yet addressed whether a plaintiff alleging retaliation in the context of a reduction in force must produce additional evidence that a prohibited criterion was a factor in her termination. *Gundacker v. Unisys Corp.*, 151 F.3d 842, 847 n.3 (8th Cir. 1.998) (declining to reach this question as plaintiff failed toe establish prima facie case of retaliation), *cert. denied*, 119 S. Ct. 801 (1999). *See also Herrero v. Saint Louis Univ. Hosp.*, 109 F.3d 481, 483-84 (8th Cir 1997) (elements of prima facie case in reduction- in- force context).

employees. *See Cross v. Cleaver,* 142 F.3d 1059, 1076 (8th Cir. 1998) (concluding that "broader scope" of the MHRA anti -retaliation provision is not implicated in case brought by employee) . *See also Keeney v. Hereford Concrete Products, Inc.,* 911 S.W.2d 622 (Mo. 1995) (MHRA provision that prohibits retaliation against "any person" broader than Title VII protection because it permits claims by nonemployees).

Defendants contend, *inter alia,* that plaintiff cannot establish that she suffered an adverse employment action on June 16, 1995. While actions short of termination may constitute an adverse employment action, *Manning v. Metropolitan Life Ins. Co., Inc.,* 127 F.3d 686, 692 (8th Cir. 1997), plaintiff must present evidence that the action had some materially adverse impact on the terms or conditions of her employment. *Coffman v. Tracker Marine, L. P.* , 141 F.3d 1241, 1245 (8th Cir. 1998) . Plaintiffs have met their burden when employers denied use of vacation days, *Id.*; provided negative job references, *Smith,* 109 F.3d at 1266; or required an employee to transfer to a position with no supervisory status and few opportunities for advancement or salary increases. *Davis v. City of Sioux City,* 115 F.3d 1365, 1369 (8th Cir. 1997). Not everything that makes an employee unhappy, however, is an actionable adverse action. *Montadon v. Farmland Indus., Inc.* 116 F.3d 355, 359 (8th Cir. 1997). Employer actions which do not result in change in pay, benefits, seniority, or responsibility are insufficient to sustain a retaliation claim. *See Flannery v. Trans World Airlines. Inc.,* 160 F.3d 425, 427 (8th Cir. 1998) (no adverse action where employer changed plaintiff's work hours, reprimanded her for dress-code violation, changed her parking space, and removed favorable letters of commendation from per-

sonnel file); *Ledergerber v. Stangler;* 122 F.3d 1142, 1144 (8th Cir. 1997) (replacing supervisor's staff and placing letter in file that discriminatory practices will not be tolerated insufficient to establish an adverse action).

Plaintiff contends that a factual dispute regarding whether Panzarino fired her on June 16, 1995 precludes summary judgment. The Court disagrees. Whether Panzarino told plaintiff she was fired is immaterial. Plaintiff presents no evidence that she lost wages, seniority, benefits, or responsibilities and, thus, she did not suffer a material change in the terms or conditions of her employment. Defendants will be granted summary judgment with respect to plaintiff's claim of retaliatory discharge on June 16, 1995.

Plaintiff has no difficulty establishing the adverse action element of her claim with respect to the September 1995 termination. Defendants contend, however, that plaintiff cannot establish the other two elements of her prima facie case: that she engaged in protected activity and that there was a causal link between such activity and her termination.

Protected activity ranges from filing a formal complaint to expressing a belief that the employer has engaged in discriminatory practices. *Cobb v. Anheuser Busch, Inc.,* 793 F. Supp. 1457, 1490 (E.D., Mo. 1990). In order to establish a link between the protected activity and the adverse action, a complaint must be specific enough to put the employer on notice that plaintiff is actually complaining about discriminatory conduct. *Odom v. St. Comm, College,* -- F. Supp.2d --, 1999 WL 80911 at * 7 (E.D. Mo. Feb. 18, 1999). Complaints about mistreatment alone are insufficient to support a retali-

ation claim. *See Wiehoff v. GTE Directories Corp.*, 61 F.3d 588, 598 (8th Cir. 1995); *Odom* at *7 (plaintiff's verbal complaints about co-worker's lack of professionalism not specific enough to put defendant on notice of sexual harassment).

As the recitation of facts above clearly establishes, plaintiff and Panzarino's working relationship was fraught with conflict. Indeed, based upon the testimony of plaintiff, Panzarino, and Quinn, the conflict would appear to have been inevitable. Plaintiff's burden is to show that, in keeping Quinn apprised of her difficulties with Panzarino, she made specific complaints about discriminatory treatment. It is not enough that she, a female employee, complained about the actions of a male supervisor, no matter how unwarranted his treatment of her may appear to have been. *See Odom*, 1999 WL 80911 (plaintiff subjected to various sexually explicit gestures and comments failed to show that he had made a specific complaint regarding sexual harassment).

Plaintiff relies chiefly on the following events: (1) on March 17, 1995, plaintiff wrote to Quinn via e-mail regarding her concern that Panzarino would not conduct a fair evaluation of her and that her salary might fall behind male employees; (2) on June 15, 1995, plaintiff e-mailed to Quinn that she was "too aggressive;" (3) plaintiff complained to Quinn that Panzarino made a discriminatory comment to Russell; and (4) plaintiff

told Fox and McKown on June 22, 1995 that Panzarino, "had a problem with women.[8]

Plaintiff's March 17, 1995 e-mail was not sufficient to put Quinn on notice that plaintiff feared she might be subject to discrimination. Plaintiff acknowledged in her deposition testimony that the specific reference was to a practice at a previous employer, not an observation that Panzarino discriminated between male and female subordinates. To the extent that plaintiff's June 15, 1995 e-mail is a complaint about being called too aggressive, it fails to put Quinn on notice that she was complaining about discrimination rather than the continuing friction with Panzarino. Finally, plaintiff's comment to Fox and McKown that Panzarino "had a problem with women" occurred during a conversation in which plaintiff also denied that sexual harassment was the issue. Plaintiff does not contest the accuracy of Fox's contemporaneous written observation that the problems with Panzarino "appear to be communication related compounded by personality conflicts."

The only evidence that plaintiff has put forward that she engaged in protected conduct was her complaint to Quinn regarding Panzarino's alleged comment to Russell. Defendants contend that plaintiff cannot rely on this

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[8]On December 5, 1994, plaintiff sent e-mail to Quinn, stating that Panzarino "seem[ed] to have decided either that [he] doesn't need an attorney or that he doesn't want that attorney to be me." This e-mail does not state, as plaintiff now asserts, that she felt Panzarino did not want her because of her gender. Similarly, plaintiff's January 31, 1995 e-mail stating that someone stuck a wad of chewing gum on her chair does not identify Panzarino as her chief suspect, nor does it indicate that plaintiff believed that this act was related to her gender.

event because there is no evidence that they engaged in any discrimination with respect to Russell.[9] A plaintiff need not establish that the opposed conduct was indeed discriminatory, but, rather, that she had a good faith belief that the conduct violated the law. *Wentz v. Maryland Cas. Co.*, 869 F.2d 1153, 1155 (8th Cir. 1989). The Court will assume, without deciding, that plaintiff's complaint to Quinn about this comment was protected action.

Plaintiff must show that her termination in September 1995 was causally related to her complaint to Quinn that Panzarino made a discriminatory comment to Russell. At deposition, plaintiff's sole evidence of a causal connection between her termination and a protected activity was that Panzarino said that all the "troublemakers" would be let go in the reorganization. In the first instance, there is no evidence to suggest that the defendants viewed persons who complained about illegal practices as troublemakers." As plaintiff acknowledges, there is no evidence that anyone ever referred to her as a troublemaker. She also acknowledges that Panzarino had no role in the decision to terminate her.

Plaintiff argues that she should not be held to responses she gave at her deposition, which was taken early in the discovery process. Plaintiff has not supplemented the record with any additional evidence of a causal link, despite the extensive discovery taken after her deposition. In opposing summary judgment, plaintiff relies solely on the temporal proximity of her com-

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[9]It is undisputed that Panzarino's alleged comment to Russell occurred *after* Russell gave her resignation

plaint to her termination. on the basis of the present record, such temporal proximity is insufficient to establish a causal connection. *See Kiel v. Select Artificials, Inc.*, 169 F.3d 1131,1136, *(8th* Cir. 1999); (generally, more than a temporal connection is required to create genuine factual dispute an retaliation)*; Ghane v. West, 148* F.3d 979, 983 (8th Cir. 1998) (plaintiff's termination one month after alleged protected activity insufficient to support retaliation claim). Thus, plaintiff has failed to establish an essential element of her prima facie case of retaliation with respect to her termination.

Furthermore, the Court believes that, viewing the evidence and the inferences from the evidence in the light most favorable to plaintiff, she has not presented evidence from which a reasonable jury could conclude that defendants' legitimate nondiscriminatory reason for her discharge - the reduction in force - was a pretext for discriminatory conduct.

Plaintiff contends that Quinn hoped to rise in the corporate hierarchy and feared that plaintiff's complaints would reflect badly on him. Thus, plaintiff contends, Quinn manipulated Cindy Munger and the re-evaluation process in order to conceal his intention to remove plaintiff. Plaintiff's argument depends upon her assertion that *Munger disagreed* with Quinn's decision to remove two attorneys. Munger's testimony was merely that, in the give and take with Quinn, she could not remember which of them first proposed "squeezing out" another position or when that decision was finally made. However, Munger unequivocally testified that if she had disagreed with Quinn's decision she would have documented that disagreement.

While there is some evidence to show that Quinn thought he might advance, plaintiff's argument requires the Court to make inferences upon an inference. Furthermore, whether Quinn or Munger decided that two attorney positions should be eliminated is irrelevant as it is undisputed that Quinn was always designated as the ultimate decisionmaker.

Plaintiff also has not presented evidence to show that Quinn's reason for terminating her, rather than O'Donnell, was a pretext. Plaintiff's assertion that O'Donnell's salary was quickly raised to match plaintiff's, thereby eliminating any possible cost-savings, is unsupported by the record. Plaintiff's assertion that Quinn ranked her higher than O'Donnell on "promotability forecasts" is immaterial as the forecasts were completed more than one year before the reduction in force was under consideration. Plaintiff's allegation that defendant destroyed 1995 performance evaluations for O'Donnell is unsupported speculation. Plaintiff's contention that coal sales work continued unabated after her termination is irrelevant because the low volume of sales work was not given as a reason for plaintiff's selection. Indeed, Quinn anticipated that it would be necessary to obtain outside counsel to complete the coal sales work at least on an interim basis.

In conclusion, plaintiff has failed to establish essential elements of her retaliation claims. In addition, plaintiff has failed to present evidence from which a reasonable jury could conclude that defendants' reasons for its employment decisions were a pretext for improper motive. Defendants' motion for summary judgment will be granted with respect to plaintiff's retaliation claims.

Plaintiff's Disparate Pay Claim

The Eighth Circuit has held that Equal Pay Act standards apply to Title VII claims of "unequal pay for equal work." *McKee v. Bi-Development Agency,* 801 F.2d 1014, 1019 (8th Cir. 1986) . Accordingly, plaintiff must show that male employees were paid more than she for equal work in jobs that required equal skill, effort and responsibility, performed under similar conditions. *McLaughlin v. Esselte- Pendaflex Corp.,* 50 F. 3d 507, 513 (8th Cir. 1995) .

Plaintiff identifies Bob Jones as a similarly- situated male employee who received more pay than she. Plaintiff's deposition testimony, however, established that Jones' responsibilities, seniority, and background were significantly distinct from her own from the day that she was hired. Plaintiff has failed to establish a prima facie case of wage discrimination.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgment [#64] is **granted.**

IT IS FURTHER ORDERED that plaintiff's motion for oral argument [#82] is **denied as moot..**

A separate judgment in accordance with this memorandum and order will be entered this same date.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 21st day of July, 1999.

UNITED STATES DISTRICT COURT --
EASTERN MISSOURI
INTERNAL RECORD KEEPING

AN ORDER, JUDGMENT OR ENDORSEMENT WAS SCANNED, FAXED AND/OR MAILED TO THE FOLLOWING INDIVIDUALS ON 07/22/99 by ksterret

4:97cvl926 Buettner vs Arch Coal Sales Co.

42:2000e Job Discrimination (Employment)

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARY BUETTNER,
Plaintiff,
v.
ARCH COAL SALES CO., et al.,
Defendants.

No. 4:97CV1926 (CEJ)

[Filed July 21, 1999]

JUDGMENT

In accordance with the memorandum and order entered this same date,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendants Arch Coal Sales Company and Arch Coal, Inc. shall have summary judgment against plaintiff and her first amended complaint is dismissed with prejudice.

/s/ Carol E. Jackson
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 21st day of July, 1999.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
DEC - 8 2000
CLERK

(2)

No. 00-743

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

MARY BUETTNER,
Petitioner,

v.

ARCH COAL SALES, INC., AND ARCH COAL, INC.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari, vacate the judgment below, and remand for further consideration in light of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (June 12, 2000), which was decided before the filing of the opinion of the Court of Appeals in this case and which was brought to that court's attention in a Petition for Rehearing en banc, where petitioner offered no evidence that the legitimate, non-discriminatory reason proffered by respondent for the elimination of petitioner's position was a pretext for discrimination.

RULE 29.6 STATEMENT

Respondents are Arch Coal Sales, Inc., and Arch Coal, Inc. Arch Coal, Inc. has no parent corporation, and Ashland, Inc. is the only publicly-held company that owns 10% or more of its stock. Arch Coal Sales, Inc. is the wholly-owned subsidiary of Arch Coal, Inc.

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Respondents Arch Coal Sales Co., Inc., and Arch Coal, Inc., respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 216 F.3d 707 (8th Cir. 2000).

STATEMENT OF FACTS

Petitioner served as Vice President, Secretary, and General Counsel of Respondent Arch Coal Sales Co., Inc., a wholly-owned subsidiary of Respondent Arch Coal, Inc., for approximately two-and-one-half years before she was laid off in September 1995 during a company-wide reduction-in-force ("RIF") (A77, A83, A169).[1] Prior to petitioner's hiring, Arch Coal Sales had no full-time attorney (A116, A153, A168). The RIF was motivated by Arch Coal's poor financial performance in 1994 (A117, A172). Jeffry Quinn, then General Counsel of Arch Coal, was responsible for reorganizing the legal department (A143, A184-85, A189, A251). His objective was to reduce costs (A174, A178). Arch Coal retained Cindy Munger, a consultant with Altman Weil Pensa and later with Arthur Andersen & Co., to conduct a re-engineering study of Arch Coal's legal department (A122, A123, A172-73).

When the study began, Quinn believed that sufficient work existed to keep petitioner busy as the full-time attorney for Arch Coal Sales (A175, A178). Quinn was considering, however, whether Arch Coal's legal work, including the commercial contracts area, could be per-

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[1] As in the Eighth Circuit's opinion, respondent Arch Coal, Inc. and Arch Coal Sales, Inc. will sometimes be referred to collectively as "Arch Coal." The Eighth Circuit appendix is cited as "A." The appendix to the petition for certiorari is cited as "Pet. Apdx."

formed by less experienced attorneys and/or paralegals at a lower cost (A176, A354-55).

In the course of her study, Munger prepared a report, with interim drafts, stating her recommendations both for a post-RIF "interim organization," as well as for a "future state" (A554-667, A777, A779, A799). As a result of Munger's study, Quinn's opinion changed about whether sufficient work existed for a full-time attorney at Arch Coal Sales (A143, A178, A183-84). Quinn came to believe, and Munger concurred based upon her own independent assessment, that two of the three attorney positions within the commercial contracts area of Arch Coal's legal function could be eliminated and that the work could be consolidated into one, more junior attorney position supported by a paralegal (A132, A139-44, A181-82, A185-86, A305, A326, A369-77, A619, A797, A773; Def. 8th Cir. Adden. A-12, A-14). That decision was based on Munger's determination that most of the legal work in the commercial contracts area was "commodity" work, *i.e.*, work that could be done by a less experienced attorney and/or paralegal (A643-46).

At the time of the legal department re-engineering study, petitioner was earning $78,224 annually; a more experienced male attorney who performed general commercial contract work was earning $100,980; and a less experienced female attorney who handled real estate contract work for a different Arch Coal subsidiary was earning $56,210 (A146-47, A153, A168-69, A212, A213). As the final decision-maker, Quinn selected petitioner and the male attorney — the two most senior and highly compensated of the three commercial contract lawyers — for layoff because of the more junior nature and lower salary level associated with the one remaining, consolidated commercial attorney position (A183, A190-191, A251-52).

Misstatements of Fact in Petitioner's Petition

The petition filed in this Court misstates several facts and omits other relevant ones. First, petitioner repeatedly states that the legitimate, non-retaliatory reason given by Arch Coal for her layoff was that Quinn selected her based on the recommendation of an independent consultant (Pet. 5, 6, 9, 11, 12, 14). The only record citation offered by petitioner is to a memorandum authored by Quinn entitled, "Thoughts About Legal Department Reengineering Study," which makes no mention of the selection of petitioner for layoff (Pet. 5-6, A547). The record shows unequivocally that petitioner's position was eliminated in the course of a company-wide restructuring that ultimately reduced the salaried workforce at Arch Coal and its subsidiaries by 17.7% (A213-14, A183, A251-52). The decision was made that the three attorney positions within the commercial contracts area could be consolidated into a single, more junior attorney position supported by a paralegal (A132, A139-44, A180-81, A185-86, A305, A326, A366, A332-33, A369-77; Def. 8th Cir. Adden. A-12, A-14). That consolidation was deemed appropriate based on the consultant Munger's determination that approximately 80% of the legal work in the commercial contracts area was "commodity" work (A571-74, A610).

Petitioner further asserts that her coal sales work "is reflected in the consultant's report as the most 'experiential' and least 'commodity'-like work," and that Quinn admitted that the coal sales work was "the most complex area of commercial legal work" performed at Arch (Pet. 16, citing A573, A457). She argues that these statements belie Arch's contention, and the Eighth Circuit's conclusion, that her work was "'commodity-like'" (Pet. 16). But even assuming the coal sales work was the

"least 'commodity'-like" and the "most complex" legal work done in the commercial contracts area, the fact remains that Munger determined that 65% of the coal sales legal work was commodity in nature (A610).[2]

Petitioner states that when she was hired, "Quinn told her she was being paid less than a similarly situated male attorney. . . " (Pet. 4 n.3). But as she acknowledges, Arch Coal was granted summary judgment on her wage discrimination claim, which was affirmed by the Eighth Circuit, and she has not challenged that ruling in her petition (Pet. 3 n.1).

Petitioner asserts that she adduced direct evidence of discrimination in the form of a statement by her former boss, Pat Panzarino, that "'women and minorities could not succeed in the coal business'" (Pet. 13). The record shows, however, that Panzarino was not involved in the decision to lay petitioner off, and that he himself was selected for layoff in the same RIF (A84, A108, A162).

Additional factual distortions and misstatements are noted below.

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[2] What Quinn actually said was that the coal sales work was "among the most complex" areas of commercial legal work (A457). Petitioner cites A573 in support of her statement that her coal sales work was the least commodity-like of the three types of legal work done in the commercial contracts area, but that reference does not support her assertion. Petitioner may have intended to cite to page 610 of the Appendix, which shows that the coal supply and real estate work were both 65% commodity in nature, although that number may be in error with respect to the real estate work. In any event, all three types of work are shown as more than 50% commodity in nature.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE RELIEF REQUESTED BY PETITIONER IS NOT APPROPRIATE IN THIS CASE.

Petitioner correctly recognizes that her petition seeks nothing more than alleged error-correction and, as such, does not warrant plenary review. So instead she requests a "GVR" disposition for reconsideration in light of *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097 (June 12, 2000) (Pet. 18). This case, however, is not appropriate for a summary grant, vacatur, and remand for several reasons.

First, *Reeves* was not an "intervening" decision, as is typically required for a summary reconsideration order. See *Stern, Gressman, Shapiro & Geller*, "Supreme Court Practice," pp. 249-50 (7th ed. 1993), citing *Board of Trustees v. Sweeney*, 439 U.S. 24 26 (1978) (Stevens, J., dissenting), for the proposition that "'such action should not be taken unless the intervening decision has shed new light on the law which, if it had been available at the time of the court of appeals' decision, might have led to a different result.'" *Reeves* was handed down on June 12, 2000, and the Eighth Circuit's opinion in the present case was filed two weeks later, on June 26 (Pet. Apdx A-2).

Second, the Eighth Circuit has already had the opportunity to consider the facts of this case in light of *Reeves*. The petition for rehearing en banc filed by petitioner relied heavily on *Reeves* and sought to persuade the court that the panel opinion was inconsistent with *Reeves*. That argument garnered only one affirmative vote from the 10-judge court (Pet. Apdx A-1).

Hence, the only relief sought by the petition is inappropriate because *Reeves* was not an "intervening" decision and because the Eighth Circuit court en banc has already determined that *Reeves* does not require a "different result."

II. THE EIGHTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH *REEVES* BECAUSE PETITIONER DID NOT PRODUCE SUFFICIENT EVIDENCE FROM WHICH A REASONABLE JURY COULD FIND THAT THE LEGITIMATE, NONDISCRIMINATORY REASON PROFFERED FOR THE ELIMINATION OF HER POSITION WAS A PRETEXT FOR RETALIATION.

Despite petitioner's best efforts to portray this case as one impacted by this Court's decision in *Reeves*, that opinion, handed down 14 days before the Eighth Circuit's decision in this case, has no bearing on her claims. This Court held in *Reeves* that when a plaintiff in a case brought under the Age Discrimination in Employment Act has presented sufficient evidence from which a reasonable jury could find that the nondiscriminatory reason proffered by his employer for his termination was pretextual, the plaintiff may be entitled to have a jury determine whether he was the victim of intentional discrimination. 120 S. Ct. at 2108.

This is not, contrary to petitioner's suggestion, a case in which the Eighth Circuit held that although there was evidence that the proffered reason for her termination was pretextual, she was not entitled to a jury trial because there was no evidence of intentional discrimination or retaliation. Nor is it a lawsuit that turns on the uncorroborated testimony of the decision-maker, as petitioner represents. In this fact-bound case, the trial

court properly held that petitioner could not make a *prima facie* case of retaliation, and that even if she could, she did not produce the requisite evidence of pretext (Pet. Apdx A-44). The Eighth Circuit questioned whether petitioner had made a sufficient *prima facie* case, but determined that issue did not need to be addressed because her "failure of proof is even more obvious" with respect to pretext (A-14-A-16). Accordingly, even if the pretext issue were re-examined, it is likely the Eighth Circuit would reach the same result by holding that petitioner had not established a *prima facie* case.

Petitioner's statement that the Eighth Circuit's 20-page opinion and the district court's earlier 26-page opinion "ignored critical evidence" that Arch Coal terminated her in retaliation for opposing alleged discrimination misrepresents those opinions (Pet. 8). Both opinions thoroughly addressed all the arguments raised and all the evidence presented by petitioner in support of her claim that the legitimate, non-retaliatory reason proffered by Arch Coal for her layoff was pretextual (Pet. Apdx A-13-A-21, A-38-A-45). But that evidence does not support any of the inferences, as urged by petitioner, that Quinn "manipulated" the consultant, or that petitioner would have been retained had she not complained of discrimination (Pet. 9, 10, 15).

As previously mentioned, petitioner misstates the legitimate, non-retaliatory reason given by Arch Coal for her layoff. The reason given was not that the layoff was based on the recommendation of an independent consultant (Pet. 5, 6, 9, 11, 12, 14), but rather that her position was eliminated in the course of a company-wide restructuring that ultimately reduced the salaried workforce at Arch Coal and its subsidiaries by 17.7%

(A213-14, A183, A251-52). Although the consultant Munger concurred in the ultimate employment decisions made with respect to the re-engineering of the legal department, Quinn at all times retained the responsibility for determining which positions, and which attorneys, would be eliminated (A143, A185, A189, A251-52). Petitioner points to no evidence, either in her current petition or in her briefs to the Eighth Circuit, that the RIF was unnecessary or that it was some sort of ruse designed to mask the company's supposedly retaliatory motive for terminating her.

Petitioner's representation that she was entitled to a "reasonable inference . . . that there was no business justification for laying off two attorneys" (Pet. 15) is similarly unfounded. The uncontradicted evidence shows that Munger determined that because the vast majority of the legal work in the commercial contract area, including that done by petitioner, was "commodity" work, it could be performed by a less experienced and lower paid lawyer, or even by a paralegal (A132, A139-44, A181-186, A305, A326, A366, A369-77, A643-46). Quinn and Munger both agreed that all of the commercial contract work could be done by the most junior — and lowest paid — attorney of the three in question, with help available from outside counsel on an as-needed basis, resulting in a significant savings in salary (A143, A183, A189, A190-91, A251-52, A535).

Petitioner maintains that prior to her alleged complaints of discrimination, Quinn had identified her as "his number one choice for a Senior Commercial Attorney position," but ultimately retained instead a "less senior, less experienced attorney whom he had rated a year earlier as his fourth choice for Assistant Commercial Attorney" (Pet. 3-4, 6 n.4, 10, 15). But what

petitioner fails to point out is that the "Promotability Forecasts" on which she relies were completed in February 1994, more than a year before the restructuring (A493). The position of "Senior Counsel-Commercial" mentioned in those forecasts is not the same as that recommended by the consultant for the "future state" of the consolidated, reorganized legal department (A140-41, A799). Moreover, petitioner's reliance on the 1994 rankings to support the "reasonable inference" that she "would have been the logical choice for the Senior Commercial attorney position which the consultant recommended be retained" ignores the undisputed goal of the 1995 company-wide restructuring: cost savings (Pet. 10; A117, A174).

Petitioner claims that Munger's second draft report dated September 4, 1995, "inexplicably eliminate[d]" a recommendation that a Senior Commercial Attorney position be retained, and that this "dramatic, overnight change . . . lends support to the inference that Quinn was manipulating Munger's recommendations to help justify the decision *he had already made, in August*, to lay off Buettner instead of the less senior O'Donnell" (Pet. 10, emphasis in original). These accusations misrepresent the record and ignore Munger's testimony. There is no evidence that Quinn manipulated Munger's report, and the recommendation was not eliminated, inexplicably or otherwise. The September 12, 1995, and the September 14, 1995, drafts of Munger's reports show a "Senior Counsel Commercial" and a "Senior Counsel Corporate" position, respectively, which titles Munger testified were interchangeable (A576, A614, A775). Quinn and Munger agreed that the Senior Counsel position was properly included in the description of the future state of the legal department, and not

in the organizational structure of the department immediately after the restructuring (A142-43, A188, A777-78, A779). The interim organizational structure immediately following the re-engineering, set forth in Munger's September 14, 1995 report, reflects the recommendations arrived at during the course of the downsizing study that three attorney positions be consolidated into one commercial attorney position (A619, A623).

According to petitioner, an inference that Quinn had manipulated the consultant's report is supported by a memo Quinn wrote to Munger (Pet. 10 and n.6, citing A547). That memo, however, was written before the September 12 draft, and consisted of Quinn's preliminary thoughts on re-engineering (A184-85). The memo hardly shows manipulation on Quinn's part, nor does it discredit Munger's independence. Quinn explained that he wanted Munger's report to reflect Andersen's independent assessment of the legal function at Arch Coal, but that because he did not want to abdicate his responsibility to the consultant, the vision for the future of the department had to come from him, with Andersen's concurrence (A185). Far from being the puppet described by petitioner, Munger testified that although she was in full agreement with Quinn with respect to the decision to eliminate the two commercial contract positions, had she not been, her "independent judgment" would have led her to document her disagreement (A773).

Despite Munger's explicit testimony that she fully agreed with the elimination of the two commercial attorney positions, petitioner argues that the evidence supports an inference that Munger in fact disagreed with that decision (Pet. 9). She points to a comment by Munger in the September 12 draft, which she selec-

tively edits to state: "we are really only eliminating one position. . . . " (Pet. 9). The full statement made by Munger is as follows: "Jeff - We need to discuss. We are really only eliminating one position, not two if you plan to put a contract person in there" (A579).

Petitioner completely disregards Munger's testimony explaining the context for this statement. Munger did not disagree with the elimination of two permanent positions in the Arch Coal legal department, but was explaining to Quinn that the hiring of a contract lawyer, which was then under discussion, would equate to downsizing by only one "full time equivalent position" (A772-73; *see also* A187, A535). Given Munger's unequivocal testimony that she agreed with Quinn's decision to eliminate two commercial contract positions in the legal department, Munger's comment to Quinn cannot support an inference that she in fact disagreed.

Again, all of the arguments raised by petitioner in her petition, and more, were fully considered and rightly rejected by the Eighth Circuit. Although petitioner is entitled to reasonable inferences supported by the record, she is not entitled to inferences supported only by speculation and her own vivid imagination. *See, e.g., Hopper v. Hallmark Cards, Inc.*, 87 F.3d 983, 988 (8th Cir. 1996). Petitioner has supplied no valid reason why the Eighth Circuit's fact-bound application of settled legal principles to the record in this case warrants further review.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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